No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERSS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(a)(2)(B) gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of that provision, notwithstanding the provisions of the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*, that insulate the OIG from agency control.

2. Whether, if OIG interviews are governed by 5 U.S.C. 7114(a)(2)(B), an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with 5 U.S.C. 7114(a)(2)(B), notwithstanding the fact that the Inspector General Act deprives an agency head of authority to direct or control the investigations of the OIG.

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The Solicitor General, on behalf of the National Aeronautics and Space Administration, Washington, D.C. (NASA Headquarters), and the National Aeronautics and Space Administration Office of the Inspector General (NASA-OIG), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 120 F.3d 1208. The decision and order (App., *infra*, 21a-57a) of the Federal Labor Relations Authority (Authority or FLRA) is reported at 50 FLRA 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. App., *infra*, 2a. A petition for rehearing was denied on March 31, 1998. *Id.* at 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (FSLMRS), enacted as Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, in pertinent part, provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at —
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> * * * * *
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —
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> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

Section 2 of the Inspector General Act of 1978 (Inspector General Act), Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. 3 § 2, in pertinent part, provides:

> In order to create independent and objective units —
>
> * * * * *
>
> there is hereby established in each of such establishments [listed in section 11(2)] an office of Inspector General.

Section 3 of the Inspector General Act, 5 U.S.C. App. 3 § 3, in pertinent part, provides:

> (a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any sub-p[o]ena during the course of any audit or investigation.
>
> (b) An Inspector General may be removed from office by the President. The President shall

communicate the reasons for any such removal to both Houses of Congress.

* * * * *

Section 9 of the Inspector General Act, 5 U.S.C. App. 3 § 9(a)(1) and (2), in pertinent part, provides:

(a) There shall be transferred —

(1) to the Office of Inspector General —

* * * * *

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

STATEMENT

1. This unfair labor practice decision arose out of the investigation of an employee of the National Aeronautics and Space Administration George C. Marshall Space Flight Center (Marshall Center) in Huntsville, Alabama. The material facts are not disputed. See App., *infra*, 23a-25a, 59a-63a.

a. In January 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) that an employee at the Marshall Center, "P," was suspected of authoring various incendiary documents. App., *infra*, 60a. (To preserve his confidentiality, the name of the

employee was referred to as "P" in the administrative decisions below. See *id.* at 60a n.1.) The documents had such titles as "Payback List," "Revenge Tactics," "Retribution List," "Goals 1990," and "Goals 1991"; the latter two described aims to seek revenge on enemies within the Marshall Center. See C.A. R.E. 20-22, 43; see also App., *infra*, 60a. The documents named Marshall Center employees as potential targets for retribution and contained specific means and methods to get revenge, such as carbon monoxide poisoning, exploding natural gas under a house, making bombs, and injecting enemies with AIDS-infected blood. C.A. R.E. 20-21. Several documents had P's name on them, and a confidential source had identified P as their author. See *id.* at 21, 44-45. Investigators also received allegations that P had conducted surveillance of the homes of other employees. *Id.* at 43.

b. Upon obtaining that information from the FBI, NASA-OIG assigned the case a high priority and began investigating immediately. App., *infra*, 23a-24a, 60a-61a; C.A. R.E. 21, 42-44. NASA-OIG investigator Larry Dill sought to interview P as soon as possible and contacted him for that purpose. *Ibid.* P stated that he wanted both legal and union representation at the interview, and Dill acceded to both requests. App., *infra*, 23a-24a, 61a. Patrick Tays attended the interview as a representative of P's Union, Local 3434 of the American Federation of Government Employees (Local 3434 or Union). App., *infra*, 3a, 24a, 61a. At the interview in the office of P's attorney, Dill began by reading prepared "ground rules," which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the govern-

ment." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to that "ground rule," after which Dill read the statement a second time and stated that he would move the interview somewhere else if Tays did not "maintain himself." *Id.* at 24a, 61a-62a. During the interview, Dill did not initially respond to Tays' request to see a particular document, although apparently Tays was able to see that document (and others) by standing behind P and his attorney. *Id.* at 24a-25a, 61a-62a. Tays later testified that P was affected by Dill's manner toward him (Tays) and that P only paid attention to his attorney and Dill and ignored Tays. *Id.* at 24a-25a, 63a. P was ultimately fired, and his current whereabouts are unknown to petitioners or (apparently) to the Union. *Id.* at 63a.

c. The Union filed charges with the FLRA, pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Headquarters had committed an unfair labor practice.[1] In particular, the Union charged that NASA-OIG and NASA Headquarters had violated 5 U.S.C. 7114(a)(2)(B), known as the "*Weingarten*" rule, which gives a federal employee in a bargaining unit the right to the participation of a union representative at an

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[1] Section 7116(a) provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency —
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> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. 7116(a)(1) and (8).

interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action.[2] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. App., *infra*, 22a, 59a. The FLRA General Counsel issued a complaint containing that charge, pursuant to 5 U.S.C. 7118(a).

The OIG responded that it had acted reasonably in light of the "delicate situation" involving the safety of Marshall Center employees and that it had not interfered with Tays' rights to participate fully as a union representative. App., *infra*, 63a. The Administrative Law Judge (ALJ) concluded that the OIG investigator was a "representative of the agency" for purposes of 5 U.S.C. 7114(a)(2)(B), that the union representative was entitled to participate actively in the interview of P, and that the OIG investigator's actions had interfered with the representative's ability to do so. App., *infra*, 64a-71a. The ALJ recommended that the Authority order NASA-OIG to cease and desist from interfering with *Weingarten* rights and to post at all NASA locations a notice that the NASA-OIG will not interfere with those rights. *Id.* at 71a-73a. Finding no evidence that NASA Headquarters "was responsible for this violation," the ALJ recommended dismissal of the charges against NASA Headquarters. *Id.* at 71a.

NASA-OIG appealed the decision to the Authority, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's

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[2] The provision is known as the *Weingarten* rule because it extends to federal employees the rights established for private-sector employees in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*DOJ*). C.A. R.E. 71-80. The FLRA's General Counsel defended the ALJ's ruling against NASA-OIG, and did not take exception to the ALJ's ruling in favor of NASA Headquarters. See App., *infra*, 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the Authority affirmed the ALJ finding of an unfair labor practice, concluding that Dill's announcement of the "ground rules" violated the statute and that, in conducting the interview, Dill was acting as a "representative" of NASA for *Weingarten* purposes. App., *infra*, 28a-48a. In reaching that conclusion, the Authority rejected the D.C. Circuit's contrary analysis in *DOJ* and adopted instead the approach set forth in the Third Circuit's earlier decision in *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). See App., *infra*, 37a-40a. In addition, the Authority reversed the ALJ's ruling with respect to NASA Headquarters, holding that agency headquarters must be held responsible for the actions of NASA-OIG to effectuate the purposes of the statute, even though the FLRA General Counsel had not filed any exceptions to the ALJ's ruling that NASA Headquarters was not responsible for the conduct at issue. *Id.* at 48a-52a. The Authority, therefore, ordered NASA Headquarters and NASA-OIG to cease and desist from restricting the participation of union representatives in interviews conducted by NASA-OIG. *Id.* at 52a-53a. The Authority further ordered NASA Headquarters to order NASA-OIG to comply with the requirements of 5 U.S.C. 7114(a)(2)(B) and to post appropriate notices at the Marshall Center. *Id.* at 53a-55a.

2. The Authority immediately filed an application for enforcement in the Eleventh Circuit. C.A. R.E. 130, 132, 133. Four days after the FLRA's petition was docketed in that court, NASA-OIG and NASA Headquarters filed a petition for review in the D.C. Circuit. C.A. R.E. 134. Both petitions were filed pursuant to 5 U.S.C. 7123(a), which provides that judicial review of the FLRA's decision or an action for enforcement by the Authority may be filed "in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." 5 U.S.C. 7123(a). Pursuant to 28 U.S.C. 2112(a) and Multidistrict Lit. Panel R. 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the Authority's application for enforcement and denied the petition for review filed by NASA Headquarters and NASA-OIG. App., *infra*, 20a.[3] The court deferred to the Authority's interpretation of "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), finding no evidence in the Inspector General Act that Congress sought to exempt the OIG from the *Weingarten* rule. In so ruling, the court of appeals adopted the analysis of the Third Circuit in *DCIS*, *supra*, and specifically rejected the contrary decision of the D.C. Circuit in *DOJ*, *supra*. App., *infra*, 7a-9a, 12a, 15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his *Weingarten* rights. The court also found NASA Headquarters guilty of an unfair labor practice on the theory that it has a supervisory role over the OIG and, therefore, has a duty to ensure that the OIG complies with the *Weingarten* rule.

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[3] The court of appeals also granted intervenor status to respondent American Federation of Government Employees, AFL-CIO. See App., *infra*, 4a.

The court denied rehearing on March 31, 1998. *Id.* at 76a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether an Office of Inspector General (OIG) investigator is a "representative of the agency" for purposes of the *Weingarten* rule, 5 U.S.C. 7114(a)(2)(B). That issue has broad practical implications for the manner in which the federal government investigates allegations of wrongdoing by federal employees; the issue affects thousands of cases and tens of thousands of interviews each year. Resolving that issue requires a reconciliation of two statutes —the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, and the Inspector General Act, 5 U.S.C. App. 3, § 1 *et seq.*— which were enacted on consecutive days in 1978 without any apparent consideration of the tension between them. Four circuits have addressed the issue presented here and have reached three different conclusions. This Court's review is warranted to resolve the conflict.

If, contrary to our submission, an OIG commits an unfair labor practice by restricting an employee's statutory *Weingarten* rights, the case also presents the question whether an agency headquarters is liable for an unfair labor practice for failing to direct the OIG to comply with 5 U.S.C. 7114(a)(2)(B). That issue also has broad implications for the independence of OIGs and the extent to which agencies may be held liable for actions over which management has no control. The decision below cannot be reconciled with the reasoning in *United States Nuclear Regulatory Commission* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*).

1. a. The better reading of the *Weingarten* provision in the FSLMRS, in conjunction with the Inspector

General Act, is that the OIG does not commit an unfair labor practice when OIG investigators restrict the participation of union representatives in OIG investigative interviews of federal employees. The court of appeals' ruling to the contrary is incorrect.

The FSLMRS establishes the scope and limits of federal sector collective bargaining. Section 7114, entitled "Representation rights and duties," provides that "[a]n exclusive representative of an appropriate unit * * * shall be given the opportunity to be represented at * * * any examination of an employee in the unit by a *representative of the agency* in connection with an investigation if * * * (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. 7114(a)(2)(B) (emphasis added).

The court of appeals upheld the FLRA's view that "representative of the agency" in Section 7114(a)(2)(B) means any official within an agency and thus includes the OIG.[4] That position, however, is inconsistent with the rationale for this Court's recognition of the right to union representation at investigative interviews in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, this Court emphasized that the representational right grows out of the collective bargaining relationship between the union and management. *Id.* at 260-261, 262. The Court determined that the rights enumerated in *Weingarten* arise out of the need to balance the power between the parties to the collective bargaining relationship:

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[4] The FSLMRS defines "agency" to mean "an Executive agency * * *," see 5 U.S.C. 7103(a)(3), but that definition does not resolve the meaning of the phrase "representative of the agency."

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire *bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the *bargaining unit* that they, too, can obtain his aid and protection if called upon to attend a like interview.
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> * * * * *
>
> Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

Ibid. (footnotes omitted) (emphasis added). The phrase "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), therefore, must be understood within the context of federal sector collective bargaining to encompass only a representative of the agency or agency component that engages in collective bargaining with the union at issue, which the OIG does not.

The Inspector General Act reinforces the conclusion that the OIG and its agents are not representatives of agency management. No other component of an agency has the independence conferred by statute upon the OIG, which operates independently of the direct supervision and influence of agency heads and outside the programmatic spheres of agencies. See *NRC*, 25 F.3d

at 232-236; see also *DOJ*, 39 F.3d at 366-367 (quoting *NRC*, 25 F.3d at 233-234).

That independence is codified in numerous ways. In particular, the NASA-OIG has a grant of statutory authority entirely different from and independent of the head of NASA. Compare 42 U.S.C. 2472 (creating NASA) with 5 U.S.C. App. 3 § 9(a)(1)(P) (creating NASA-OIG).[5]

More generally, the Inspector General Act provides that the OIG for each department shall be an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). Each OIG must submit semi-annual reports to the agency head on the results of its investigations, and the agency head in turn must submit those reports to Congress within thirty days; even though an agency head may add comments on a report, the agency head cannot prevent the report from going to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of

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[5] That differentiation is common among agencies and their OIGs. Compare, *e.g.*, 7 U.S.C. 2201 (creating Department of Agriculture) with 5 U.S.C. App. 3 § 9(a)(1)(A) (creating Agriculture OIG); 20 U.S.C. 3411 (creating Department of Education) with 5 U.S.C. App. 3 § 9(a)(1)(D) (creating Education OIG); 29 U.S.C. 551 (creating Department of Labor) with 5 U.S.C. App. 3 § 9(a)(1)(J) (creating Labor OIG); 42 U.S.C. 3532 (creating Department of Housing and Urban Development (HUD)) with 5 U.S.C. App. 3 § 9(a)(1)(G) (creating HUD OIG); 42 U.S.C. 7131 (creating Department of Energy) with 5 U.S.C. App. 3 § 9(a)(1)(E) (creating Energy OIG).

"particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the OIG to the agency head and in turn transmitted by the agency head to the appropriate committee or subcommittee of Congress within seven days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). An OIG is required to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law," 5 U.S.C. App. 3 § 4(d), and is to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.

Moreover, although the OIG "report[s] to and [is] under the *general* supervision of the head [of the agency]," 5 U.S.C. App. 3 § 3(a) (emphasis added), only the President, not the agency head, may remove an Inspector General, 5 U.S.C. App. 3 § 3(b). Absent a specific statutory provision pertaining to a particular OIG, neither the agency head nor the deputy may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). Indeed, other than the "general supervision" of the agency head and one deputy, the Inspectors General "shall not report to, or be subject to supervision by, any other officer of such [agency]." 5 U.S.C. App. 3 § 3(a). Thus, "no one else in the agency may provide any supervision to Inspectors General." *NRC*, 25 F.3d at 234.

Accordingly, an OIG is entirely "shielded with independence from agency interference" in the conduct of its work, *NRC*, 25 F.3d at 234, which spans a broad spectrum of responsibilities and powers: to conduct audits and investigations of the agency as the OIG deems "necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2); to

have unfettered access to agency documents and personnel, 5 U.S.C. App. 3 § 6(a)(1) and (3); to issue subpoenas and administer oaths, 5 U.S.C. App. 3 § 6(a)(4) and (5); and to "receive and investigate complaints or information from an[y] employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety," 5 U.S.C. App. 3 § 7(a). OIGs conduct the full range of criminal and administrative investigations. 5 U.S.C. App. 3 § 4.[6] Because of the statutory separation of the OIG from the collective bargaining unit and the independence conferred on the OIG by statute, therefore, the OIG is not subject to 5 U.S.C. 7114(a)(2), which governs the relationship between labor and management. Accordingly, an OIG should not be charged with an unfair labor practice when it restricts the participation of a union representative in an investigative interview.

In construing the FSLMRS and the Inspector General Act to reach a contrary result, the court below erroneously focused on the effect of an interview on the employee rather than on the statutory separation of the

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[6] See, *e.g.*, *New Eng. Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) ("functions of OIG investigators are not so different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington N. R.R.* v. *OIG, R.R. Retirement Bd.*, 983 F.2d 631, 634 (5th Cir. 1993) (legislative history shows purpose of Inspector General Act "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations of [various executive] departments and agencies") (quotation omitted).

OIG from the agency it is charged with investigating. The court of appeals opined that "[t]he Statute [5 U.S.C. 7114(a)(2)(B)], like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations." App., *infra*, 10a-11a (citing *DCIS*, 855 F.2d at 99). That analysis is incorrect. As the D.C. Circuit recognized, an employee can reasonably fear that disciplinary action may follow an interview conducted by an FBI agent or any number of other federal law enforcement agents, for example, yet it would not ordinarily be thought that the *Weingarten* statute requires the participation of a union representative at such an interview. *DOJ*, 39 F.3d at 366.

b. The four circuits to consider this issue have reached three different results and expressly acknowledged the circuit conflict. The Third Circuit has ruled that an OIG investigator is a "representative of the agency" and must therefore comply with the *Weingarten* rule in OIG investigations, *DCIS*, 855 F.2d 93, a result followed by the Eleventh Circuit below.[7]

The D.C. Circuit reached precisely the opposite conclusion in *DOJ*, 39 F.3d 361, creating a conflict that it acknowledged (*id.* at 366-67), as did the court below

[7] The Eleventh Circuit has reserved the question whether the rule applies to interviews conducted in the course of a criminal investigation, see App., *infra*, 11a n.6., while the Third Circuit has held that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100.

(App., *infra*, 7a-8a). The D.C. Circuit concluded that an OIG investigator is not bound by the *Weingarten* rule for several reasons: first, the effort to characterize the OIG investigator as a "representative of the agency" within the meaning of Section 7114(a)(2)(B) "encounters considerable semantic difficulty," *id.* at 365; second, applying the rule to OIG investigators "clashes with the Inspector General Act of 1978," *id.* at 366; and third, because the rule is "[r]ooted * * * in labor-management relations," which are not relevant to the activities of the OIG. *Id.* at 368.

The "semantic" problem identified by the D.C. Circuit arises from the fact that the *Weingarten* rule is triggered when "a representative of the agency" questions an employee. When an OIG investigator does the questioning, there is no suitable "agency" to which the statutory term could refer. The agency that directly employs the person under investigation cannot qualify, because the OIG investigator is not a representative of that agency; the employing agency "c[an] not direct the investigator, and it ha[s] no control over him." 39 F.3d at 365. And the OIG itself, which does control the investigator, cannot be the agency mentioned in the statute because the "agency" in that phrase must be an entity that contains the employee's bargaining unit.[8] The OIG does not in fact contain the bargaining unit to which the employee under investiga-

[8] Because Section 7114(a)(2) provides for participation by "an exclusive representative of an appropriate *unit in an agency*" (emphasis added)—*i.e.*, a labor union, see 5 U.S.C. 7114(a)(1)—at "any examination of an employee in the unit by a representative of *the agency*," 5 U.S.C. 7114(a)(2)(B) (emphasis added), the court reasoned that the agency represented by the investigator must contain the bargaining unit of the investigated employee. 39 F.3d at 365-66.

tion belongs, *id.* at 365-66, nor could it do so, because the FSLMRS, 5 U.S.C. 7112(b)(7), expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly—an apt description of investigators working for the Inspector General." 39 F.3d at 366 n.5 (citing *NRC*, 25 F.3d at 235).

The D.C. Circuit also found the independence conferred on the OIG by the Inspector General Act inconsistent with the view that an OIG investigator is a "representative of the agency" for purposes of the *Weingarten* rule. See 39 F.3d at 366-367. For that point the D.C. Circuit drew heavily on the analysis of the Fourth Circuit in *NRC*, 25 F.3d at 235. In *NRC*, the Authority had ruled that agency management was compelled to bargain over four proposals intended to bind OIGs in the conduct of their investigations. The Fourth Circuit rejected that determination because it would interfere with and undercut the independence of the OIG. See generally 25 F.3d at 233-236. So too here, the D.C. Circuit concluded that "[g]iven these provisions [of the Inspector General Act], none of which the Authority or the Third Circuit in *Defense Criminal Investigative Services* mentioned, there cannot be the slightest doubt that Congress gave the Inspector General the independent authority to decide 'when and how' to investigate (*United States Nuclear Regulatory Comm'n*, 25 F.3d at 234)" and "that the Inspector General's independence and authority would necessarily be compromised if another agency of the government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." 39 F.3d at 367. The D.C. Circuit thus rejected the Third Circuit's decision in *DCIS* in large part because the Third Circuit (and the Authority) had failed to consider or analyze the relevant provisions of the Inspector General Act. See *ibid.*

Finally, the D.C. Circuit noted that the *Weingarten* rule was intended to "ameliorate the inequality of bargaining power between an employee going it alone and his employer," 39 F.3d at 368, but found that "[t]hese considerations do not apply to examinations of employees under oath in the course of an Inspector General's investigation" because the OIG's independence means that "the Inspector General cannot side with management, or the union." *Ibid.*

The Second Circuit recently adopted a third approach, concluding that the applicability of *Weingarten* rights turns on the nature of the investigation being conducted by the OIG. *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683 (2d Cir. 1997) (*FLRA* v. *DOJ*). The Second Circuit did "not agree with the Third and Eleventh Circuits that section 7114(a)(2)(B) applies to questioning by an OIG agent simply because the inquiry concerns 'possible misconduct' of employees 'in connection with their work,' *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used to 'support administrative or disciplinary actions,' *NASA/FLRA*, 120 F.3d at 1213." 137 F.3d at 691. Rather, the Second Circuit held that the OIG cannot be considered a "representative of the agency" for purposes of the *Weingarten* rule so long as an OIG's investigation involves matters within the scope of bona fide functions of the Inspector General Act. 137 F.3d at 690-691. The court based that conclusion on the view that "Congress would [not] have wanted the *Weingarten* protection of the [FLMRS] to be circumvented by a request from an agency head to have an OIG agent

conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions." *Id.* at 690. Thus, "[s]o long as the OIG agent is questioning an employee for bona fide purposes within the authority of the [Inspector General Act] and not merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibilities, the OIG agent is not a 'representative' of the employee's agency for purposes of section 7114(a)(2)(B)." *Id.* at 690-691. The Second Circuit's general rule, therefore, is similar to that of the D.C. Circuit, but contains an important qualification: if the OIG acts beyond its statutory mandate, it may be required to comply with the *Weingarten* rule. *Id.* at 691. Thus, although the Second Circuit cautioned that OIG investigators "disregard the *Weingarten* protections at their peril," it also minimized that concern: "In view of the broad scope of [Inspector General Act] functions, however, the risk that questioning by an OIG agent without the presence of a union representative would violate section 7114(a)(2)(B) seems remote." *Ibid.*

c. The federal government has a strong interest in determining whether OIG investigators must comply with the *Weingarten* rule, because the rule severely impairs the ability of OIGs to discharge their statutorily-mandated functions. First, the union representative (unlike the employee's counsel) serves the collective bargaining unit as a whole, and not just the individual employee who is the subject of the investigatory interview. The OIG thus reasonably fears that the *Weingarten* representative will share information learned in the investigatory interview with other members of the collective bargaining unit who might subsequently be interviewed or requested to produce documents in the OIG investigation. Second, under the Authority's precedent, when the *Weingarten* rule applies, it includes not only the right to the assistance of a union representative at the interview, but also an array of rights that would fetter the OIG's ability to conduct an investigation, from the right to prior notice of questions to a right to defer the interview for up to 48 hours.[9]

Moreover, the Authority has ruled that "nothing in section 7114(a)(2) * * * prevents parties from negotiating contractual rights to union representation beyond those provided by that section." *United States Dep't of Justice, Justice Management Div.*, 42 FLRA 412, 435 (1991). In particular, in *United States Nuclear Regulatory Comm'n*, 47 FLRA 370 (1993), the Authority ruled that organized components of an agency are required to negotiate regarding the "procedures" (5 U.S.C. 7106(b)(2)) and "appropriate arrangements" (5 U.S.C. 7106(b)(3)) that apply specifically to OIG investigations, even though OIGs are exempt from

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[9] The Authority has interpreted the *Weingarten* rule to include the right to be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins, see *FAA, New Eng. Region, Burlington, Mass.*, 35 FLRA 645, 652-54 (1990); the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions, see *United States Dep't of Justice, INS*, 46 FLRA 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra* (reversal on the ground that the rule does not apply to OIGs); and the right to negotiate for 48-hours' notice before an investigator can begin an examination of a union employee, see *U.S. Department of Justice, INS*, 40 FLRA 521, 549 (1991), rev'd on other grounds *sub nom., United States Dep't of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992).

collective bargaining under the FSLMRS. Although that decision was reversed by the Fourth Circuit in *NRC*, we are unaware of any indication that the Authority would not apply it outside the Fourth Circuit in the absence of controlling contrary authority.

Finally, the FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation no matter how serious the matter or what emergency circumstance might necessitate immediate questioning. App., *infra*, 52a-53a. Consequently, a determination as to whether the rule applies to OIG investigators may determine whether a particular matter can be effectively investigated by the OIG.

The continuing importance of the issue is underscored by the pendency of many unfair labor practice charges brought by federal employee unions against OIGs and the agencies in which they operate for alleged violations of the *Weingarten* statute. See, *e.g.*, *U.S. Dep't of Justice, Office of Inspector General*, Case No. WA-CA-80156 (motion for summary judgment and cross-motions to dismiss pending before FLRA); *Social Security Admin., Headquarters and Social Security Admin. Office of Inspector General*, Nos. AT-CA-60874 & 60875 (consolidated) (pending before FLRA); *USDA Farm Serv. Agency and USDA Office of Inspector General*, No. DE-CA-60399 (exceptions to ALJ decision pending before FLRA); *U.S. Dep't of Justice, Office of Inspector General*, Case No. DE-CA-80076 (motion for summary judgment and cross-motion to dismiss pending before FLRA); *Social Security Admin. Headquarters and Social Security Admin., Office of Inspector General*, Nos. SF-CA-80172 & 80174 (consolidated) (pending before FLRA); *U.S. Dep't of Justice, Federal Bureau of Prisons*, Case No. SF-CA-80415 (complaint pending before the FLRA); *U.S. Dep't of Justice, Office of Inspector General*, Case No. SF-CA-80424 (complaint pending before FLRA). Thus, there is no question that the issue will recur.

Moreover, the circuit conflict creates uncertainty for OIGs as to which rules apply to which interviews and investigations. In this case, for example, review was appropriately sought in both the D.C. and Eleventh Circuits, see *supra* pp. 8-9, which now have conflicting rules. Before conducting an investigative interview, the OIG has no ability to determine which court of appeals will ultimately be called upon to decide the case. A single investigation might involve some interviews that are exempt from the *Weingarten* rule and some that are not, with the latitude afforded to the investigator and the rights enjoyed by the employee turning on where the person lives and transacts business and, in the event of multiple petitions, the vicissitudes of the court of appeals assignment process. This Court's review is essential to resolve the conflict, which has serious day-to-day consequences for an OIG's ability to perform its mission of investigating fraud and abuse within the federal government in a consistent and effective manner.

2. The court below also held that NASA Headquarters was liable for an unfair labor practice because NASA-OIG decided not to afford the employee statutory *Weingarten* rights. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act outlined above. If an OIG cannot be held to have committed an unfair labor practice because it is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it would not logically follow that an agency headquarters is also liable for the OIG's action. The decision below incorrectly construed the Inspector General Act and the FSLMRS to hold NASA Headquarters liable for the NASA-OIG's actions in this case. See App., *infra*, 19a. Because the D.C. Circuit in *DOJ* and the Second Circuit in *FLRA* v. *DOJ* found no unfair labor practice from the OIG's denial of a union representative at an interview, they had no occasion to address whether the agency headquarters would be legally responsible for the OIG's actions. In their reliance on the Inspector General Act, however, those courts made clear that they would have reached a result different from the Eleventh Circuit on that issue.

Similarly, the decision below cannot be reconciled with the rationale underlying the Fourth Circuit's decision in *NRC*. See 25 F.3d 229. In that case, the court considered whether the OIG's manner of conducting investigations was a proper subject of collective bargaining between the agency and the union. The court held that it was not. *Id.* at 234. The court reasoned that to permit such bargaining "would impinge on the statutory independence of the Inspector General." *Ibid.* "One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased." *Id.* at 233. The court further rejected the FLRA's argument that "the power of 'general supervision' given to the two top agency heads could be used to limit or restrict the investigatory power of the Inspector General." *Ibid.* The court then noted its disagreement with how the FLRA had "chosen to expand the limited holding of

Defense Criminal Investigative Service" because such an expansion "would directly interfere with the ability of the Inspector General to conduct investigations." *Id.* at 235.

The decision below is inconsistent with the Fourth Circuit's reasoning. If an agency cannot bargain over the manner in which an OIG conducts investigations, it follows that an agency also cannot order an OIG to comply with an interpretation of law about which the OIG might have a good-faith disagreement. That concern is not hypothetical. As the examples in *supra* note 9 demonstrate, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could reasonably disagree over whether an investigator must follow certain procedures to comply with rules that the FSLMRS does not elucidate but that eventually become law through FLRA decisions. An order by agency headquarters to an OIG to comply with such a procedure would "directly interfere with the ability of the Inspector General to conduct investigations," *NRC*, 25 F.3d at 235, in the same ways that an agency's collective bargaining over the OIG's investigative methods and procedures adversely affects an OIG's independence.

The Court would not reach the second issue presented if it agreed with our submission that an OIG is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on the first issue would also require a reversal of the unfair labor practice charged against NASA Headquarters. But because of the way the courts of appeals have addressed the interplay between the FSLMRS and the Inspector General Act, full consideration on the merits is also warranted for the second question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1998

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-6630, 95-6690

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.,
RESPONDENTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
INTERVENOR

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, WASHINGTON, D.C.,
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
INTERVENOR

Sept. 2, 1997

Before: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

KRAVITCH, Senior Circuit Judge:

The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101, *et seq.*, ("FSLMRS" or the "Statute") grants federal employees the right to be represented by a union representative at an investigatory examination conducted by "a representative of the agency" if the employee reasonably believes that the examination may result in disciplinary action. 5 U.S.C. § 7114(a)(2). We must decide, in the face of conflicting circuit authority, whether the Federal Labor Relations Authority ("FLRA" or the "Authority") properly concluded that an investigator from an agency's Office of the Inspector General ("OIG") is "a representative of the agency" within the meaning of § 7114(a)(2)(B).

I.

This case arose out of an investigation of an employee of the George C. Marshall Space Flight Center ("MSFC"), a component of the National Aeronautics and Space Administration ("NASA-HQ") that is located in Huntsville, Alabama. The NASA Office of the Inspector General ("NASA-OIG"), which is also a component of NASA-HQ, received information from the Federal Bureau of Investigation ("FBI") in January 1993 linking the MSFC employee to several documents that set forth potential threats and plans for violence against his MSFC co-workers. NASA-OIG immediately began to investigate whether the employee had in fact authored these documents. When NASA-OIG Special Agent Larry Dill contacted the employee to arrange an

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

interview, the employee requested both legal and union representation, and Dill agreed to this request.[1]

At the outset of the interview, Dill stated that the union representative was present only to serve as a witness and was not to interrupt questions or answers.[2] Dill further informed the union representative, Patrick Tays, that he could be called as a witness for the government in the future. Tays objected to these grounds rules, and Dill responded by stating that he would cancel the interview if Tays did not comply with them. On a number of occasions during the examination, Dill challenged Tays's efforts to represent the employee.

Local 3434 of the American Federation of Government Employees ("AFGE"), the exclusive representative of the bargaining unit employees at the MSFC, filed a complaint pursuant to 5 U.S.C. § 7116(a)(1), (8) charging NASA-OIG and NASA-HQ with commiting an unfair labor practice.[3] The complaint alleged that NASA-OIG and NASA-HQ violated 5 U.S.C. §

[1] By this time, NASA-OIG had determined that no criminal action would be taken again the employee.

[2] According to the interview ground rules established by Dill, if the MSFC employee did not answer the questions asked of him, he would face dismissal.

[3] Section 7116(a) provides:

For the purpose of this chapter, it shall be an unfair labor practice for an agency–

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

7114(a)(2)(B) by interfering with the union's representation of the employee at the interview with Dill. After a hearing, the Administrative Law Judge ("ALJ") determined that Dill's action violated the union's right to take an active role at the investigatory examination. It therefore found NASA-OIG guilty of an unfair labor practice, but concluded that NASA-HQ was not responsible for the actions of the OIG investigator, NASA-OIG filed exceptions to the ALJ's rulings.

Upon review of the ALJ's order, the Authority determined that the ALJ had properly concluded that Special Agent Dill was a "representative of the agency" and that NASA-OIG was guilty of an unfair labor practice. The Authority disagreed, however, with the ALJ's ruling with respect to NASA-HQ, concluding that NASA-HQ, as the parent agency of NASA-OIG, was also responsible for the violation of § 7114(a)(2)(B). The Authority therefore ordered NASA-OIG and NASA-HQ to cease and desist from interfering with the representational rights granted by § 7114(a)(2)(B). It further directed NASA-HQ to post appropriate notice forms and to order NASA-OIG to comply with the requirements of § 7114(a)(2)(B) when conducting investigatory examinations.

NASA-HQ and NASA-OIG petitioned for review of the Authority's determination, and the Authority filed a cross-application for enforcement of its order. We subsequently granted AFGE's motion for leave to intervene in this appeal.

II.

We review decisions of the FLRA in accordance with § 706 of the Administrative Procedure Act, *see* 5 U.S.C. § 7123(c), and will set aside only those Authority actions

that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether an action is in "accordance with law," we defer to the Authority's interpretation of the FSLMRS because of its specialized expertise in the field of federal labor relations. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 96, 104 S. Ct. 439, 444, 78 L.Ed.2d 195 (1983) ("*ATF* "); *Fort Stewart Sch. v. FLRA*, 860 F.2d 396, 405 (11th Cir. 1988), aff'd, 495 U.S. 641, 110 S. Ct. 2043, 109 L.Ed.2d 659 (1990). Thus, in considering an ambiguous provision of the FSLMRS, we are bound to uphold the Authority's construction as long as it is "reasonable and defensible." *ATF*, 464 U.S. at 96, 104 S. Ct. at 444.

In contrast, we grant no deference to the Authority's construction of a federal statute outside the field of federal labor relations. *See United States Nuclear Regulatory Commission v. FLRA*, 25 F.3d 229, 232 (4th Cir. 1994) ("*NRC*"); *FLRA* v. *Department of Defense*, 977 F.2d 545, 547 n. 2 (11th Cir. 1992). Similarly, when the Authority "resolves an arguable conflict between another statute and its own, we are required to make a wholly independent analysis of that issue." *Defense Criminal Investigative Service v. FLRA*, 855 F.2d 93, 98 (3d Cir. 1988) ("*DCIS*").

Accordingly, we undertake a bifurcated review of the Authority's decision in this case. We will review with deference the Authority's interpretation of § 7114(a)(2)(B) and will uphold its conclusions with respect to this section as long as they are reasonable and defensible. We will determine independently, however, whether the Authority's construction of this section of its own statute impermissibly conflicts with another federal

statute, namely the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12. Accord *NRC*, 25 F.3d at 232; *DCIS*, 855 F.2d at 97-98.

III.

Congress enacted § 7114(a)(2)(B) to extend the rights established for private sector employees in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959, 43 L.Ed.2d 171 (1975), to federal employees. *See* 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall); *DCIS*, 855 F.2d at 96. Section 7114(a)(2) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if–
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

In this case, it is undisputed that the employee reasonably believed that the examination would result in disciplinary action and that he requested representation. Moreover, NASA-OIG now concedes that the actions of Special Agent Dill interfered with the union's right to be represented at the investigatory interview.[4] Whether or not NASA-OIG violated § 7114(a)(2)(B)

[4] The Authority held that the overly restrictive ground rules set forth by Dill violated the Statute, and NASA-OIG has not appealed this aspect of the Authority's decision.

thus depends solely on whether Special Agent Dill was a "representative of the agency" when he conducted the examination.

Two circuits have considered the status of OIG investigators under § 7114(a)(2)(B) and have reached opposite conclusions. In *Defense Criminal Investigative Service* v. *FLRA*, the Third Circuit held that investigators of the Defense Criminal Investigative Services ("DCIS"), a subdivision of the Department of Defense ("DOD") under the authority of that agency's Inspector General, are bound by the terms of this section. 855 F.2d 93 (3d Cir. 1988) ("*DCIS* "). The court concluded that "[i]t is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action." *Id.* at 98-99. The court expressly rejected DCIS's contention that "representative of the agency" referred only to members of the bargaining unit with which the employee's union has a collective bargaining agreement. *Id.* at 99-100.

In *Department of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994) ("*DOJ*"), the D.C. Circuit concluded that the DOJ's Office of the Inspector General was not the "agency" Congress intended under § 7114(a)(2)(B) because it had no collective bargaining relationship with the union. *Id.* at 365-66. In holding that interviews with DOJ's OIG investigators are not governed by the federal *Weingarten* provision, the *DOJ* court relied on the independence and authority granted Inspector Generals by the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12 ("IG Act"). "[T]he Inspector General's independence and authority would necessarily be com-

promised if another agency of government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." *Id.* at 367.

In the face of these conflicting opinions, the Authority independently analyzed the terms of § 7114(a)(2)(B). It first determined that NASA-HQ was the relevant agency under this section. *See* 5 U.S.C. § 7103(a)(3) (defining "agency" to mean an "Executive agency"). The Authority then concluded that NASA-OIG should be considered a representative of NASA-HQ for the purposes of § 7114(a)(2)(B) because it is a subcomponent of NASA-HQ and provides investigatory information to NASA-HQ and to other agency subcomponents for use in disciplinary proceedings.

The Authority rejected NASA-OIG's assertion that § 7114(a)(2)(B) applies only to examinations conducted by an employee of a component of the agency that has a collective bargaining relationship with the union. Implying such a requirement, the Authority reasoned, would frustrate Congress's intent to provide federal employees the assistance of a union representative whenever they are called upon to provide information that exposes them to the risk of disciplinary action. The Authority further concluded that application of the *Weingarten* protection to OIG interviews did not threaten NASA-OIG's independence or otherwise conflict with the IG Act.

NASA-OIG contends that the Authority erred in construing the terms of § 7114(a)(2)(B). It claims that all of the rights and duties enumerated in § 7114 derive from a collective bargaining relationship and thus do not extend to parties outside that relationship. More

specifically, NASA-OIG argues that "representative of the agency" refers only to a representative of the agency or agency component that engages in collective bargaining with the union at issue.[5] NASA-OIG notes that in § 7114(a)(2)(A), Congress used "representative of the agency" in referring to discussions concerning matters under the collective bargaining agreement. *See* 5 U.S.C. § 7114(a)(2)(A). NASA-OIG also points to § 7103(a)(12), which defines collective bargaining as the performance of the mutual obligation of good-faith bargaining imposed on "the representative of an agency" and the exclusive representative of employees in an appropriate unit in the agency. *See* 5 U.S.C. § 7103(a)(12).

After a careful examination of the text and motivating purposes of § 7114(a)(2)(B), we find no error in the Authority's interpretation of "representative of the agency." NASA-OIG's textual arguments, although not wholly without merit, do not convince us that Congress could not have intended the result reached by the Authority. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). In § 7103(a)(3), Congress defined "agency" to include executive agencies, and it is undisputed that NASA-HQ falls within the statutory definition of "agency." 5 U.S.C. § 7103(a)(3). Nothing in the text of § 7114(a)(2)(B) indicates to us that Congress intended a different meaning when it used "agency" in § 7114(a)(2)(B). The

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[5] Neither NASA-OIG nor NASA-HQ has a collective bargaining relationship with the employee's union. As NASA-OIG notes, the Statute excludes Inspector Generals from the collective bargaining process. *See* 5 U.S.C. § 7112(b)(7); *DOJ*, 39 F.3d at 365 n.5.

fact that Congress elsewhere used "representative of the agency" and "representative of an agency" in the context of collective bargaining matters does not establish in our view that Congress must have intended to depart from the statutory definition of "agency" and to imply a collective bargaining requirement in § 7114(a)(2)(B). *Accord DCIS*, 855 F.2d at 100.

Moreover, we agree with the Authority that reading such a requirement into "representative of the agency" in § 7114(a)(2)(B) would undermine Congress's purpose in enacting this section. Congress enacted § 7114(a)(2)(B) to extend *Weingarten* protection to federal employees. *See* 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall). In *Weingarten*, the Court upheld the NLRB's ruling entitling employees who "seek[ ] 'aid or protection' against a perceived threat to employment security" to union representation during intimidating investigatory confrontations. 420 U.S. at 260, 95 S. Ct. at 965. In enacting § 7114(a)(2)(B), Congress also sought to provide for "union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him." 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall) (quoting *Weingarten*, 420 U.S. at 267, 95 S. Ct. at 968). The Statute, like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations. *See DCIS*, 855 F.2d at 99 ("[W]e doubt that Congress intended that union

representation be denied to the employee solely because [the investigator was] employed outside the bargaining unit.").

The Authority determined that NASA-OIG performs an investigatory role for NASA-HQ and its components such as MSFC. Moreover, the Authority determined that information obtained during the course of NASA-OIG investigations may be used by NASA components to support administrative or disciplinary actions taken against bargaining unit employees. Under these circumstances, we conclude that the Authority's determination that the NASA-OIG investigator was a "representative of the agency" within the meaning of § 7114(a)(2)(B) is a permissible construction of the Statute.[6]

NASA-OIG nevertheless contends that the Authority's interpretation of § 7114(a)(2)(B), even if otherwise defensible, cannot be sustained because it impermissibly conflicts with the IG Act, 5 U.S.C. app. 3 §§ 1-12. Specifically, NASA-OIG contends that subjecting OIG interviews to the *Weingarten* provision would impermissibly hinder the function of each agency's OIG because the OIG was designed to operate independently of the direct supervision and influence of the agency head and outside the programmatic spheres of the agency. *See DOJ*, 39 F.3d at 367.

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[6] Because this case involved only potential administrative rather than criminal consequences for the employee, we need not determine the availability or scope of § 7114(a)(2)(B) protection in the context of criminal investigatory examinations and need not determine whether Congress intended "representative of the agency" to extend to agency components which, unlike NASA-HQ, have authority to investigate wrongdoing outside of the parent agency.

We find nothing in the text or legislative history of the IG Act, however, to justify exempting OIG investigators from compliance with the federal *Weingarten* provision. No provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes.[7] Moreover, we do not find a sufficient conflict between the purpose of the IG Act and the mandate of § 7114(a)(2)(B) so that we would imply such an exemption into the text of the IG Act. *See DCIS*, 855 F.2d at 100.

Congress created the Offices of the Inspector General in order "to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations" of certain specified federal agencies. S. Rep. No. 95-1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676 (1978); *see also* 5 U.S.C. app. 3 § 2. In order to accomplish these goals, Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating. For example, even though Inspector Generals are under the "general supervision" of the agency head, only the President, not the agency head, may remove an Inspector General. 5 U.S.C. app. 3 § 3(a), (b). Neither the agency head nor the deputy may

[7] In certain statutes, Congress has expressly insulated the authority of investigatory organizations from encroachment by otherwise applicable statutes. *See, e.g.*, 28 U.S. C. § 535(a) (granting FBI authority to investigate "any violation of title 18 involving Government officers and employees [] notwithstanding any other provision of law"). Courts have read such language to excuse compliance with the FSLMRS. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir.) (construing 32 U.S.C. § 709), *cert. denied*, 459 U.S. 988, 103 S. Ct. 343, 74 L.ED.2d 384 (1982).

"prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. app. 3 § 3(a). And apart from the limited supervision of the top two agency heads, no one else in the agency may provide any supervision to the Inspector General. *Id.* ("[The Inspector General] shall not report to, or be subject to supervision by, any other officer of [the agency]."); *see also* NRC 25 F.3d at 233-35 (characterizing agency head supervision of OIG as "nominal");[8] *DOJ*, 39 F.3d at 367 (discussing independence of OIG).

In Congress's view, such independence was necessary to prevent agency managers from covering up wrongdoing within their agencies in order to protect their personal reputations and the reputations of their agencies. In light of the potentially conflicting agendas of agency management and Inspector Generals, Congress created the safeguards necessary to ensure that Inspector Generals could conduct their investigations without interference from agency management personnel. *See* S. Rep. No. 95-1071, 95th Cong., 2d Sess.

[8] In *NRC*, the Fourth Circuit held that the union could not require the agency to negotiate rights relating to OIG interviews. *Id.* at 235. It reasoned that allowing the union and management to negotiate these rights would provide management an opportunity to interfere with the OIG's investigatory tools and would therefore conflict with Congress's intent to make the OIG independent from agency management. *Id.* at 234. We do not consider the holding or reasoning of the Fourth Circuit to be inconsistent with the Third Circuit's opinion in *DCIS*. Both cases recognize that the OIGs must remain independent from agency management if they are to be able to fulfill their statutory fucntion. *See NRC*, 25 F.3d at 233; *DCIS*, 855 F.2d at 98. Moreover, the court in *NRC* did not reject the reasoning of *DCIS*, but instead merely distinguished its "limited holding." *NRC*, 25 F.3d at 235.

(1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2682; *DCIS*, 855 F.2d at 98 ("[T]he purpose of these provisions was to insulate Inspector Generals from pressure from agency management which might attempt to cover up its own fraud, waste, ineffectiveness or abuse."). We do not believe that the presence of a union representative at OIG interviews, as mandated by federal statute, creates the type of interference from which Congress sought to insulate OIG investigators. The employees' statutory right to union representation does not provide management with an opportunity to interfere with OIG investigations or to cover up fraud or waste within its own agency.

Moreover, we do not believe that the presence of a union representative will impermissibly hinder the OIG's ability to perform its essential function of detecting and preventing fraud and abuse within the agencies. The *Weingarten* representative is present only to assist the employee, and the employer is free to insist in hearing only the employee's own account of the matter under investigation. *See Weingarten*, 420 U.S. at 260, 95 S. Ct. at 965. The representative's presence "need not transform the interview into an adversary process." *Id.* at 263, 95 S. Ct. at 966. Although NASA-OIG has suggested that *Weingarten* rights have been expanded by the Authority, it points to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations. Moreover, we do not see how the right of an employee to be represented by a union representative presents a significantly greater interference with OIG interviews than the existing right of an employee to be represented at such interviews by an attorney. See 5 U.S.C. § 555(b) (providing for the right to be advised and represented by counsel for anyone

compelled to appear in person before an agency or agency representative).

We therefore conclude that allowing a union employee to exercise the full rights granted to him or her by § 7114(a)(2)(B) is not sufficiently inconsistent with the IG Act to justify an implied exemption for OIG investigators. *See DCIS*, 855 F.2d at 101 ("Given the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion in [OIG] interviews."). If in the future, *Weingarten* representatives operate to impede OIG investigations, it would be the responsibility of Congress and not the courts to fashion a solution to such a problem.[9] But absent a discernible present conflict between the IG Act and § 7114(a)(2)(B), we refuse to read the IG Act to have impliedly repealed this section of the FSLMRS. See *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483, 41 L.Ed.2d 290 (1974) ("[I]t is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective."). Accordingly, we conclude that the Authority correctly determined that OIG Special Agent Dill was a "representative of the agency" within the meaning of § 7114(a)(2)(B) and, because of Dill's conduct at the investigatory interview, that NASA-OIG was guilty of an unfair labor practice.

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[9] Because Inspector Generals report semi-annually to Congress, *see* 5 U.S.C. app. 3 § 5(b)(1), they will have the opportunity to alert Congress to any difficulties that the assertion of *Weingarten* rights may create in the future.

IV.

Having determined that the Authority properly concluded that NASA-OIG violated § 7116(a), we now must determine whether the Authority correctly determined that NASA-HQ was also responsible for this violation. NASA-HQ asserts two challenges to the Authority's ruling. First, it argues that the ruling cannot be enforced because the decision "lacked procedural fairness." Second, NASA-HQ contends that the Authority erred in holding it liable for the actions of the OIG investigator because NASA-OIG is not under its direct supervision.

Because NASA-HQ did not raise these arguments before the Authority, we cannot consider them "unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). We conclude that extraordinary circumstances are present in this case. The Authority raised the issue of NASA-HQ's liability *sua sponte* when no issues relating to NASA-HQ were before the Authority and filed for enforcement of its order on the same day the order was issued. Although NASA-HQ should have petitioned the Authority for reconsideration of its ruling on this issue, *see* 5 C.F.R. § 2429.17, we find that the circumstances of this case justify our consideration of the arguments raised by NASA-HQ. *Cf. EEOC v. FLRA*, 476 U.S. 19, 23, 106 S. Ct. 1678, 1681, 90 L.Ed.2d 19 (1986) (suggesting that *sua sponte* treatment of issue by Authority may excuse failure to request reconsideration); *NLRB v. FLRA*, 2 F.3d 1190, 1196-97 (D.C. Cir. 1993) (failure to file for rehearing was excusable because of "almost *sua sponte*" nature of Authority's decision and because motion for reconsideration would have been futile). In reviewing the Authority's determination with respect to NASA-HQ, we are mindful that we shall not set aside Authority action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c).

NASA-HQ claims that the Authority's ruling lacked procedural fairness because, as the Authority recognized, no exceptions had been filed with respect to the ALJ's recommendation that the unfair labor practice complaint against NASA-HQ be dismissed. The Authority nevertheless determined that it was proper for it to address that issue because NASA-HQ was a party pursuant to 5 C.F.R. § 2421.11(b)(1)(i) ("party" means any agency "named as [a] charged party in a charge"), and because the Authority had previously addressed *sua sponte* matters that had not been excepted to by the parties. *See*, e.g., *United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 43 FLRA 642, 654 (1991), *enforced sub nom. United States Immigration and Naturalization Service v. FLRA*, 12 F.3d 882 (9th Cir. 1993); *see also* 5 C.F.R. § 2423.29(a) ("After considering the Administrative Law Judge's decision, the record, and any exceptions and related submissions filed, the Authority shall issue its decision affirming or reversing the Administrative Law Judge, in whole, or in part, or making such other disposition of the matter it deems appropriate . . . "). NASA-HQ provides us with no authority indicating that the FLRA's conclusion that it had the power to modify the ALJ's rulings on grounds not excepted to by the parties is not entitled to deference.[10]

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[10] NASA-HQ's claim of "lack of procedural fairness" is further undermined by the fact that it was named as a party in the original complaint, had adequate notice of the charges against it, and chose

We now turn to the merits of the Authority's decision holding NASA-HQ responsible for the actions of NASA-OIG and directing NASA-HQ to order NASA-OIG to comply with the requirements of § 7114(a)(2)(B). The Authority previously has recognized that a component of an agency violates § 7116(a)(1) of the Statute when it "engages in conduct which unlawfully interferes with the protected rights of employees of another component." *See Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 F.L.R.A. 875, 884 (1986). And the Authority has held parent agencies responsible for statutory violations committed by its subcomponents even when the parent does not have a collective bargaining relationship with the union. *See U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 F.L.R.A. 991, 1000-01 (1993); *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Ill.*, 44 F.L.R.A. 117, 125 (1992), *rev. denied sub nom., Headquarters, U.S. Air Force, Washington, D.C.* v. *FLRA*, 10 F.3d 13 (D.C. Cir. 1993).

In this case, the Authority found NASA-HQ guilty of an unfair labor practice because, as the parent agency, it failed to ensure that NASA-OIG complied with § 7114(a)(2)(B). The Authority found that investigative information obtained by NASA-OIG can be a basis upon which NASA-HQ disciplinary action is taken and that NASA-OIG reports to and is under the general supervision of NASA-HQ. Based on these findings, the

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not to attend the hearing before the ALJ. Moreover, NASA-HQ had an opportunity to petition for reconsideration of the Authority's ruling but neglected to do so. The fact that NASA-HQ and NASA-OIG are part of the same agency and now represented by the same attorneys on appeal also suggests to us that NASA-HQ was not deprived of procedural fairness.

Authority concluded that the purposes of § 7114(a)(2)(B) would be served by requiring NASA-HQ to advise NASA-OIG of its obligation to comply with the Statute.

Although NASA-OIG is an "independent and objective" unit of NASA-HQ, *see* 5 U.S.C. app. 3 § 2, NASA-OIG is subject to the general supervision of the agency head. 5 U.S.C. app. 3 § 3(a). In conducting investigations within the agency, NASA-OIG serves the interest of NASA-HQ by soliciting information of possible misconduct committed by NASA employees. The fact that the NASA-OIG agent in this case ordered the employee to answer questions or face dismissal further suggests that the investigator was acting for NASA-HQ when it conducted the interview. We therefore find no clear error in the Authority's determination that NASA-HQ should be held responsible for the investigator's violation of § 7114(a)(2)(B).

Moreover, we conclude that the Authority's order directing NASA-HQ to order NASA-OIG to comply with the terms of this section does not intrude on the independence of NASA-OIG. As discussed earlier, the OIG need only have enough independence from agency management so that it can effectively discover and cure abuses and inefficiency within the agency. Requiring agency management to order the OIG to comply with a congressional directive does not in our view intrude on the statutory independence of the OIG. We therefore hold that the Authority did not abuse its discretion when it found NASA-HQ responsible for the unfair labor practice and directed it to order NASA-OIG to comply with the Statute.

V.

Accordingly, NASA's petition for review is DENIED and the FLRA's application for enforcement of its order is GRANTED.

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY/UNION)

AT-CA-30481

DECISION AND ORDER

July 28, 1995

Before the Authority: PHYLLIS N. SEGAL, Chair; TONY ARMENDARIZ and PAMELA TALKIN, Members.

I. *Statement of the Case*

This unfair labor practice case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Respondent National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C. (NASA, OIG). The General Counsel filed an opposition to the Respondent's exceptions.

The complaint alleges that Respondents Headquarters, National Aeronautics and Space Administration, Washington, D.C. (NASA, HQ) and NASA, OIG violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to comply with the provisions of section 7114(a)(2)(B) of the Statute. Specifically, the complaint alleges that the Respondents refused to allow a Union representative to actively participate in an examination of a unit employee held pursuant to section 7114 (a)(2)(B). The Judge found that NASA, OIG violated the Statute as alleged, and recommended dismissal of those portions of the complaint that allege violations of the Statute by Respondent NASA, HQ.

For the reasons explained below, we find first that NASA, OIG's investigatory examination of a unit employee was conducted in a manner that violated section 7114(a)(2)(B) of the Statute because the exclusive representative was precluded from actively participating in the examination. Second, we find that the NASA, OIG investigator who conducted the investigatory examination is a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. Third, we find that both NASA, OIG and NASA, HQ violated the Statute.

II. *Judge's Decision*

A. *Judge's Findings of Fact*

The facts, which are set forth fully in the attached Judge's decision, are summarized here. The George C. Marshall Space Flight Center (MSFC) at Huntsville, Alabama is a component of the National Aeronautics and Space Administration (NASA), headquartered in Washington, D.C. NASA, OIG is also a component of NASA and is similarly headquartered in Washington, D.C. Offices of NASA, OIG are maintained at all NASA component operations, including MSFC. Although NASA, OIG agents are assigned to local NASA centers, they do not report to officials at such centers, including MSFC. Rather, through a chain of command they report to NASA, OIG headquarters in Washington, D.C. The Inspector General, in turn, reports to the Administrator of NASA, the head of the agency. The American Federation of Government Employees, Local 3434, is the exclusive representative of an appropriate unit of MSFC employees.

In 1993, NASA, OIG received information from the Federal Bureau of Investigation (FBI) pertaining to an employee at MSFC. The employee, referred to as P,[11] was linked to documents that purportedly might pose a serious threat to co-workers. The information was conveyed to NASA, OIG investigator Larry Dill at MSFC.[12] When Dill contacted P to set up an interview,

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[11] The Judge referred to the employee as "P" due to the nature of the allegations against him and the limited relief requested by the General Counsel.

[12] Dill determined, after consulting appropriate investigative agencies, that employee P had not violated the law and, as a result,

P requested both legal and Union representation. Dill agreed.

Dill's investigative examination of P took place in P's attorney's office. Also present were Union representative Patrick Tays and another NASA, OIG investigator. At the beginning of the interview, Dill read prepared ground rules, which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government." Judge's Decision at 3. Tays objected when the ground rules were read and explained that he was "there to represent the union's and the bargaining unit's interests and P's interests." *Id.* After hearing Tays' objection, Dill read the ground rules statement again. Tays then objected again, arguing that he was not a witness, and Dill responded that he would cancel the meeting and move it someplace else at a different time if Tays did not "'maintain himself.'" *Id.* at 4 (footnote omitted).

During the examination, many of Tays' actions were challenged by Dill. In particular, when Tays asked to see some documents that had been shown to P's attorney, Dill regarded this as "a distinct interruption of the interview process." *Id.* Thereafter, when documents were reviewed, Tays, who was seated at the opposite end of the table, went over and stood behind P and his attorney to view the documents. Later, when Tays cautioned P against speculating in response to a question, Dill responded that Tays could not direct P

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that the matter would be administratively, rather than criminally, investigated. Transcript of hearing at 36.

not to answer the question because, as a witness, "he [Tays] 'was just there.'" *Id.* On the other hand, when P's attorney offered the identical advice regarding the same question, Dill responded: "Okay, fine." *Id.*

Dill's "actions regarding [Tays'] role in the proceeding affected the way P subsequently reacted to Tays' questions or comments." *Id.* As a result, P "ignored [Tays] and paid attention only to his attorney or Dill." *Id.*

B. *Judge's Conclusions*

The Judge found that Dill acted as a "representative of the agency" within the meaning of section 7114(a)(2)(B) when he examined P, and further concluded "that the information secured by [NASA] OIG is referred for administrative or disciplinary action to MSFC. . . ." *Id.* at 5, 6. The Judge thereafter determined that Dill's conduct of the examination interfered with the union's right to take an active role "in assisting the employee to elicit and present facts as contemplated by the Statute." *Id.* at 9. In particular, the Judge found that Tays' objections were both minor and justifiable and did not unduly disrupt or interfere with the objective of the examination. Consequently, the Judge concluded that Tays' conduct did not warrant denying him his right, as the union representative, to take an active role in the examination.

In response to NASA, OIG's argument that Tays was able to fulfill his responsibility to the bargaining unit, the Judge concluded that the fact that Tays may have done so was "immaterial." *Id.* at 9. The Judge further stated: "An agency can not [sic] impose an unduly restrictive limitation on a union representative and later escape responsibility by taking advantage of, or

finding fault with, the representative's conduct under the circumstances." *Id.* at 9-10.

Accordingly, the Judge found that NASA, OIG violated section 7116(a)(1) and (8) of the Statute. Lastly, the Judge recommended that the complaint be dismissed as to NASA, HQ, finding that the record evidence failed to show that it was responsible for the violation.

III. *Positions of the Parties*

A. *Respondent NASA, OIG's Exceptions*

Respondent NASA, OIG excepts to the Judge's holding that NASA, OIG investigator Dill acted as a representative of the agency within the meaning of section 7114(a)(2)(B) of the Statute. NASA, OIG's argument in this regard relies entirely upon the holding of the United States Court of Appeals for the D.C. Circuit in *United States Department of Justice v. FLRA*, 39 F.3d 361, 365-68 (D.C. Cir. 1994) (*DOJ*). NASA, OIG urges the Authority to overrule its precedent stated in *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3d Cir. 1988) because that precedent is inconsistent with the Inspector General Act of 1978, as amended, 5 U.S.C. app. §§ 1-12 (1988) (IG Act).

NASA, OIG's second exception concerns the Judge's finding that investigator Dill's reading of the ground rules constituted interference with the union representative's right to take an active part in the examination. In support of this exception, NASA, OIG states

that the Judge failed to apply an objective standard in accordance with Authority case law for determining interference under section 7116(a)(1). NASA, OIG further claims that an examination of the ground rules reveals nothing that could reasonably tend to intimidate or coerce the union representative, or from which he could reasonably have drawn a coercive inference.

In its last exception, NASA, OIG asserts that the posting of the Notice should be limited to MSFC, the site of the bargaining unit. In this regard, NASA, OIG points out that the Judge's order requires a posting of the Notice at all NASA facilities where bargaining unit employees are located.[13]

B. *General Counsel's Opposition*

The General Counsel argues that the Authority should affirm the Judge's ruling that the NASA, OIG investigator is a representative of the agency within the meaning of section 7114(a)(2)(B) of the Statute. In this connection, the General Counsel urges the Authority to apply its precedent.

With regard to NASA, OIG's second exception, the General Counsel argues that the Judge correctly concluded that the investigator's conduct of the investigatory examination, including the reading of the threat to cancel the examination when the union representative objected to the ground rules, improperly interfered

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[13] NASA, OIG also excepts to the language of the Judge's cease and desist order. NASA, OIG maintains that the words "its" and "our" (referring to NASA, OIG employees) should be deleted from paragraph 1.(b) of the Order and the second paragraph of the Notice. The General Counsel has no objection to this exception. The modified Order and Notice below reflect the Authority's decision with regard to this matter.

with the union representative's right to take an active part in the examination.

Lastly, the General Counsel maintains that the breadth of the Judge's posting requirement contained in the recommended order is appropriate. In support of this assertion, the General Counsel states that a broad posting requirement is necessary in this case to inform all NASA employees who may come under NASA, OIG's scrutiny of their section 7114(a) (2)(B) rights.

IV. *Analysis and Conclusions*

Two central questions are presented in this case: (1) whether the investigatory examination of P was conducted in a manner that violated the Statute; and (2) whether NASA, OIG investigator Dill was acting as a "representative of the agency" within the meaning of section 7114(a)(2)(B). For the reasons explained below, we answer each of these questions in the affirmative. Having so concluded, we further determine that both NASA, OIG and NASA, HQ violated the Statute, and issue an appropriate remedial order, requiring, among other things, a posting at MSFC.

A. *The Conduct of the Examination Violated Section 7114(a)(2)(B)*

1. *Congressional Codification of "Weingarten"*

An exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the

examination and requests representation.[14] 5 U.S.C. § 7114(a)(2)(B). It is clear from the legislative history that this statutory requirement is intended to provide rights to Federal sector bargaining unit employees consistent with those provided in the private sector by the National Labor Relations Board (Board) in interpreting and applying the National Labor Relations Act and the Supreme Court's decision in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1974) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in* Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 926 (*Legislative History*) (Congressman Udall explained that the purpose of the House bill provisions which led to the enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in *Weingarten*); *see also Internal Revenue Service, Washington, D.C., Internal Revenue Service, Hartford District Office v. FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982).

In *Weingarten*, the Supreme Court recognized that an employee who is questioned during an investigatory examination which may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Weingarten*, 420 U.S. at 263. Thus, the union representative must be free to help clarify the issues or facts, or to suggest other employees who may have knowledge of them. *Id.* at 260.

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[14] That the employee (1) reasonably feared discipline as a result of the examination and (2) requested union representation are not at issue in this case.

An exclusive representative, whose presence is requested under section 7114(a)(2)(B), also protects "the interests of the entire bargaining unit. A union representative present at an investigatory examination is able to exercise vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id.* at 260-61.

Finally, the Supreme Court recognized that a union representative's presence at an investigatory examination benefits not only the employee, but the employer as well. In this connection, the Court stated that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263.

2. *Case Law Under Section 7114(a)(2)(B) and in the Private Sector*

In accordance with the principles embodied in *Weingarten*, the Authority has consistently held that the purposes underlying section 7114(a)(2)(B) can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts in his or her defense. *See, e.g., United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 440 (1990) (*Safford*). Thus, the Authority found an unfair labor practice in *Safford* when a union representative was told to remain silent at an examination. *Id.* This pronouncement is in line with the Authority's longstanding position finding an investigator's unduly aggressive and intimidating behavior during an investigative interview to be unlawful. *See, e.g., Norfolk Naval Shipyard*, 9 FLRA 458 (1982). On the other hand, the Authority has

recognized that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity. *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645, 652 (1990).

The Authority has recognized that section 7114(a)(2)(B) rights have their origin in private sector labor law, and in interpreting the Statute, has looked to the Board's development of the *Weingarten* right *See U.S. Immigration and Naturalization Service, New York District Office, New York, New York*, 46 FLRA 1210, 1218-21 (1993) (*INS District Office*), *rev. denied sub nom. American Federation of Government Employees, Local 1917 v. FLRA*, 22 F.3d 1184 (D.C. Cir. 1994) (without opinion).[15] In this regard, the Board has, on several occasions, addressed the role of a union representative at a *Weingarten* examination.

The Board has found unfair labor practices when a union representative was prevented from actively participating in an investigatory interview. In *National Labor Relations Board v. Texaco, Inc.*, 659 F.2d 124, 126-27 (9th Cir. 1981) (*Texaco*), the United States Court of Appeals for the Ninth Circuit affirmed a Board finding of an unfair labor practice, and held that by relegating the union representative "to the role of a passive observer" the company did not afford the employee the representation to which he was entitled.

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[15] However, the Authority has noted Congress' recognition that the right to representation might evolve differently in the private and Federal sectors, and that Board decisions would not necessarily be controlling in the Federal sector. *See INS, District Office*, 46 FLRA at 1218; *Legislative History* at 824.

Similarly, in *United States Postal Service*, 288 NLRB 864, 868 (1988) (*Postal Service I*), the Board found a violation where the union representative was frustrated in his attempts to assist a unit employee because the interviewer expected that the union representative's role be comparable to that of a witness rather than a participant and therefore silenced the union representative whenever he interrupted the interviewer's questioning of the employee. Finally, the Board found a violation in *Greyhound Lines, Inc.*, 273 NLRB 1443, 1448 (1985) (*Greyhound*) where an interrogator advised a union representative at the commencement of an interview that "although he could be present as a witness he would have to remain silent and not participate."

The Board, however, reached a different conclusion in *United States Postal Service*, 303 NLRB 463 (1991) (*Postal Service II*), a case presenting somewhat similar facts as are present in the instant case. There, a bargaining unit employee was the subject of an investigatory examination. Before the union representative arrived, an investigator informed the employee that the representative "would be present only as a witness and instructed [the employee] not to speak to nor look at the union representative. . . ." *Id.* at 470. The Board affirmed the ALJ's finding that no violation had occurred.

The *Postal Service II* ALJ noted that the union representative "expressed herself on several occasions during the interview on [the employee's] behalf, and the postal inspectors listened to her, and interrupted her only after they understood the point she was making." *Id.* The ALJ found that "even though [the union representative] was instructed to be seated behind the em-

ployee in a chair away from the table, whenever it became necessary for her to inspect [the employee's] ledger book which was on the table, she stood up and walked to the table so she could better observe the particular part of the ledger book that the postal inspector was referring to, and the postal inspectors did not object to her doing so." *Id.* Finding that under certain circumstances the pre-interview admonition to the employee "might very well constitute a violation of Section 8(a)(1) of the Act, insofar as it was reasonably calculated to interfere with [the employee's] right to [the union representative's] participation in the interview," the ALJ nevertheless determined that in this case no violation had occurred because "[the union representative], without objection, was permitted to participate in the interview on [the employee's] behalf and in fact did participate on his behalf . . . ." *Id.*

3. *Application of the Case Law*

We find that NASA, OIG investigator Dill's conduct of the examination of employee P prevented union representative Tays from actively participating in the examination, in violation of the Statute and Authority precedent. *See Safford*, 35 FLRA at 440. As the Statute and the above case law indicate, the Authority has uniformly held that a union representative must be given the opportunity to actively participate in an examination of a unit employee conducted pursuant to section 7114(a)(2)(B) of the Statute. In this case, it is clear from the outset of the examination that Dill prevented Tays from playing an active role in the examination. He established intrusive ground rules which relegated Tays to the role of a mere "witness" at the examination. When Tays objected to the nature of the ground rules, Dill reiterated them, and threatened

to cancel the examination and move it to another location if Tays did not comply with his rules. Dill's actions in this case were attempts to preclude representative Tays from actively participating in the interview and thus run afoul of the Statute.

In concluding that the Statute was violated, we have considered the fact that Tays disregarded Dill's ground rules and, at least to some extent, participated in P's examination. However, we find that the statutory violation occurred when the overly restrictive ground rules were announced.[16] An attempt to restrict the union's role at a section 7114(a)(2)(B) examination to that of a witness is not in accordance with the Statute or the decisions of the Authority.[17] We agree with the Judge's conclusion that it is immaterial whether Tays, in fact, was able to fulfill his statutory responsibilities, as an agency cannot impose unduly restrictive limitations on a union representative and later seek to escape responsibility by taking advantage of the representative's conduct under the circumstances. Were the agency so entitled, a union representative would be placed in the untenable position of either complying with the ground rules, *see, e.g., Safford*, 35 FLRA at 431, and thereby failing to fulfill the exclusive representative's statutory responsibilities, or objecting

[16] In response to Tays' objection, had Dill withdrawn or properly revised the ground rules to permit active representation, a different case would be presented. Instead, however, the violation was exacerbated by Dill's reiteration of the ground rules in responding to Tays' objection.

[17] We note that such a constraint upon the union representative's role is similarly not in accord with *Weingarten* or decisions of the Board. *See* A.2., above.

to the ground rules, thus subjecting the representative to charges of disruption or insubordination.

Notwithstanding Tays' attempts at representation during the interview, we find that the imposition of overly restrictive ground rules and the manner in which this interview was conducted had a chilling effect upon the union's exercise of its rights under section 7114(a)(2)(B). Tays testified that the union had no role and that at times P would not listen to him, instead listening only to his attorney.[18] Contrary to the Respondent NASA, OIG's exceptions, we do not find these to be the mere subjective perceptions of representative Tays; rather, we conclude that Dill's insistence upon imposing the restrictive ground rules he announced would reasonably tend to have a coercive or intimidating impact upon any individual seeking to represent an exclusive representative. Additionally, bargaining unit members who become aware of the manner in which this examination was conducted could reasonably conclude that requesting union representation pursuant to section 7114(a)(2)(B) would be futile.[19]

[18] The union's interest at a section 7114(a)(2)(B) examination is not vindicated by the presence of an employee's private counsel. *See American Federation of Government Employees, Local 1941, AFL-CIO v. FLRA*, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988).

[19] We note that in *DOJ*, 39 F.3d at 365 n.2, the D.C. Circuit suggested in dictum that the record did not support a violation because the union representative admitted that there was nothing else that he "wanted to do or planned on doing that [he] couldn't do" in representing the unit employee at the examination. The record testimony distinguishes this case. Here, Tays testified that during the examination: the OIG agents had "run the meeting the way they wanted; the union had no role;" the conditions "really affected me" and the way P reacted to Tays' questions or

In concluding that the Statute was violated in this case, we have considered the NLRB's *Postal Service II* decision wherein the Board found no statutory impropriety under somewhat similar circumstances. There are significant factual variances which distinguish the two cases and justify different results. In *Postal Service II*, the pre-interview rules imposed restrictions on the *employee's* participation at the examination and were announced prior to the union representative's arrival; as a result, the union representative presumably was unaware of the ground rules. In contrast, in this case, the ground rules restricted the *union representative's* participation in the examination and were read to the union representative at the examination. Moreover, when Tays attempted to explain his role and to clarify the ground rules, investigator Dill ignored his plea, reiterated the ground rules, and threatened to cancel the examination and move it to another location. In *Postal Service II*, the examiner listened to the representative and did not interrupt her until the point she was making was understood. This conduct of an interrogation is contrasted with Dill's view that Tays' request to see documents was a "distinct interruption of the interview process" and with Dill's understanding of the limited role Tays played as a witness—he was "just there." Judge's Decision at 4.

In addition, finding a violation in this case is entirely consistent with the Board's holdings in *Texaco*, *Postal Service I*, and *Greyhound*, discussed above. In each of those cases, as here, the Board held that a union

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comments; and the atmosphere was "chilling," "an oppressive environment." (Transcript of hearing at 26-27).

representative was illegally relegated to the role of a silent or passive observer or witness.

B. *NASA's OIG Investigator is a "Representative of the Agency" Under Section 7114(a) (2)(B)*

1. *Case Law Interpreting "Representative of the Agency"*

The Authority has long held that an OIG investigator can, under certain circumstances, be a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). In *DOJ*, 39 F.3d at 365-68, however, the D.C. Circuit squarely rejected the Authority's interpretation of this statutory language as well as the Third Circuit's rationale in affirming the Authority's decision in this regard. Given the irreconcilable ultimate conclusions reached by these two United States Courts of Appeals, we have carefully considered the facts and reasoning in both decisions.

As relevant here, the facts in *DCIS* and *DOJ* were in all material respects analogous to the scenario presented in the case currently before us. Both *DCIS* and *DOJ* involved interviews of bargaining unit employees who worked for a subcomponent of the agency. In both cases, the employees requested representation by their exclusive representative and in each instance the representative was the exclusive representative of employees within the agency's subcomponent. In each instance, the investigator con-

ducting the respective interviews represented the parent agency's separate investigative component in its office of inspector general. In both cases the respondents claimed that the investigators were not representatives of the agency within the meaning of the Statute. The Authority rejected these arguments, finding in both cases that the agencies' inspector general subcomponents had violated section 7114(a)(2)(B). Both agencies appealed the Authority's decision.

In *DCIS*, the agency argued to the Third Circuit that the "agency" referred to in the Statute is the governmental entity with which the union has a collective bargaining agreement. The court responded that it "would have some difficulty understanding an interpretation limiting 'agency' to the subdivision comprising the collective bargaining unit and excluding 'representatives' of management that are employed in the higher echelons . . . ." *DCIS*, 855 F.2d at 99. The agency also argued that its agent did not conduct the interviews as a "representative of the agency"—the DOD—for purposes of section 7114(a)(2)(B), because it is independent of the DOD. The court rejected this argument, stating that in the context of the objective underlying section 7114(a)(2)(B), "the degree of supervision exercised by DOD management over the affairs of the DOD-OIG is simply irrelevant." *Id.* at 100.

The D.C. Circuit also addressed whether the investigator in *DOJ* was acting as a "representative of the agency" under the Statute, and concluded he was not. The court examined the introductory phrase under section 7114(a)(2)—"An exclusive representative of an appropriate unit in an agency"—and concluded that the OIG, despite qualifying as a statutory agency, "could not have been the 'agency' section 7114(a)(2)(B)

contemplates." *DOJ*, 39 F.3d at 365. The court reached this conclusion because "[t]he union here was not . . . the 'exclusive representative of an appropriate unit in the agency,' that is, in the Office of [the] Inspector General." *Id.* (footnote omitted).

Both courts examined provisions of the Inspector General Act (IG Act). In *DCIS*, the agency argued that section 3(a) of the IG Act[20] was intended to prevent other agency programmatic concerns, such as Federal labor relations matters, from interfering with the IG's statutory functions. The court rejected the DCIS' argument and instead found the purpose of the IG Act was to insulate the IGs from pressure from agency management. *DCIS*, 855 F.2d at 98. The *DCIS* court refused to hold that in enacting the IG Act, Congress intended to repeal section 7114(a)(2)(B) of the Statute. *Id.* at 100.

On the other hand, in DOJ, the D.C. Circuit considered several provisions of the IG Act aimed at maintaining an independence from the parent agency or subcomponent thereof to be audited.[21] The court found

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[20] Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

5 U.S.C. app. § 3(a).

[21] In explaining its opposition to the Third Circuit's reasoning in *DCIS*, the D.C. Circuit relied upon, and quoted extensively from, *United States Nuclear Regulatory Commission*,

that neither the Third Circuit in DCIS, nor the Authority, had considered these provisions in finding violations of the Statute. The D.C. Circuit concluded, contrary to the Third Circuit and the Authority, that the IG's independence would be jeopardized "if another agency of government—the Federal Labor Relations Authority—influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice." *DOJ*, 39 F.3d at 367.

2. *Application of Relevant Statutory Provisions and Case Law*

Consistent with our decision in *DOD, DCIS*, and the Third Circuit's affirmance of this decision in *DCIS*, we find that investigator Dill was acting as a "representative of the agency"—NASA, HQ—within the meaning of section 7114(a)(2)(B). We reach this conclusion based upon our determination that: (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents

Washington, D.C. v. FLRA, 25 F.3d 229 (4th Cir. 1994) (*NRC*). However, it cannot be concluded from the NRC decision that the United States Court of Appeals for the Fourth Circuit would agree with the D.C. Circuit's decision in *DOJ*. Unlike *DOJ*, and unlike the present case and *DCIS*, which all arose in the context of an unfair labor practice complaint, *NRC* arose in the context of a negotiability dispute. In a 2-1 decision, the Fourth Circuit reversed the Authority's upholding of the negotiability of several proposals involving investigative interviews. Although the Fourth Circuit disagreed with the Authority's negotiability determination, the *NRC* panel majority recognized that *DCIS* was distinguishable in that it arose in the context of an unfair labor practice complaint. *Id.* at 235. More importantly, the *NRC* majority neither criticized, nor viewed its decision as inconsistent with, *DCIS*. *See id.*

of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the IG Act are not irreconcilable. *See DCIS*, 855 F.2d at 99, 100. These determinations will be addressed in turn.

a. *Section 7114(a)(2)(B) Covers the Actions of Management Personnel Employed in Other Subcomponents of the "Agency"*

In enacting section 7114(a)(2)(B), Congress provided Federal employees and their exclusive representatives with certain representational rights during an interview of a bargaining unit employee. There is no basis in the Statute or its legislative history to make the existence of these statutory rights dependent upon the organizational entity within the agency to whom the person conducting the examination reports.[22] As explained above, Congress intended that Federal employees have the same rights as their counterparts in the private sector—the assistance of a union representative when they are called upon to provide information that exposes them to the risk of disciplinary action. *See Legislative History*, at 926. There is no dispute that the NASA, OIG investigator, although employed in a separate component from the MSFC, is an employee of and ultimately reports to the head of NASA. As discussed below (paragraph c.(2)), NASA, OIG not only provides investigatory information to NASA, HQ but also to other NASA subcomponent offices. It is equally clear

[22] If such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG) to conduct investigative interviews of bargaining unit employees.

and unchallenged that NASA is an "agency" under 5 U.S.C. § 7103(a)(3). As the Third Circuit stated: "We doubt that Congress intended that union representation be denied to the employee solely because the management representative is employed outside the bargaining unit." *DCIS*, 855 F.2d at 99.

b. *Statutory Independence of IGs Is Not Controlling*

To be sure, the IG Act grants an IG a degree of freedom and independence from the parent agency that employs him or her. However, this statutory recognition of autonomy is not absolute, and becomes nonexistent when the IG's purpose in "conducting interviews . . . is to solicit information concerning possible misconduct of [agency] employees in connection with their work," and "the information secured may be disseminated to supervisors in affected subdivisions of the [agency] to be utilized by those supervisors for [agency] purposes." *DCIS*, 855 F.2d at 100.

As is evident from the facts in this case, in some circumstances, NASA, OIG performs an investigatory role for NASA, HQ and its subcomponents, specifically MSFC. The information obtained during the course of an OIG investigatory examination may be released to, and used by, other subcomponents of NASA to support administrative or disciplinary actions taken against unit employees. Contrary to the D.C. Circuit's determination that "[t]he Inspector General does not stand in the shoes of management," *DOJ*, 39 F.3d at 368, under these circumstances we conclude, in agreement with the Third Circuit, that "Congress would regard

[an OIG] investigator as a 'representative of the [agency].'" *DCIS*, 855 F.2d at 100.[23]

c. *The Requirements of Section 7114(a)(2)(B) and the IG Act Do Not Conflict*

We conclude that the requirements of section 7114(a)(2)(B) do not conflict with the IG Act. In reaching this conclusion, we have examined the language of both statutes and their legislative histories and considered the interrelationship between these two enactments.

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[23] The D.C. Circuit noted that in an agency such as the Department of Justice, it saw no distinction between investigative interviews being conducted by an OIG employee and, for example, an FBI agent. The court found that under the Authority's logic both would be "representatives of the agency" and thus obliged to comply with 5 U.S.C. § 7114(a)(2)(B). Finding it "impossible to believe" that questioning by an FBI agent could be constrained by the Statute, the court rejected the Authority's holding. *DOJ*, 39 F.3d at 366. We note that in its hypothetical, the D.C. Circuit did not consider the FBI's statutory authority to "investigate any violation of title 18 involving Government officers and employees—(1) *notwithstanding any other provision of law.*" 28 U.S.C. § 535(a) (emphasis added).

Although the situation envisioned by the D.C. Circuit is not present in the case before us, a cautionary note is appropriate. Our decision herein should not be construed as suggesting that we would conclude in all circumstances that every employee of each subcomponent of agencies having government-wide, law-enforcement responsibilities, such as the Department of Justice, is a "representative of the agency" for the purposes of section 7114(a)(2)(B). Such cases might well be distinguished in light of statutory responsibilities extending outside of the parent agency, as contrasted with the OIG's jurisdiction and its actions in this case, which are focused on internal agency matters.

(1) *Statutory Language*

An examination of the individual provisions of the IG Act reveals no inconsistency with the Statute in general, or section 7114(a)(2)(B) in particular. *See* IV.B.2., above. As noted earlier, the IG enjoys a degree of independence from the parent agency; however, the text of the IG Act establishes that the IG plays an integral role in assisting the agency and its subcomponent offices in meeting the agency's objectives. Under section 2(1) of the IG Act, the investigations and audits that the agency's IG is authorized to conduct and supervise are focused entirely on the agency's programs and operations. 5 U.S.C. app. § 2(1). Section 2(2) of the IG Act sets forth the IG's leadership role in promoting "the economy, efficiency and effectiveness" of, and in preventing fraud and abuse in, the agency's programs and operations. 5 U.S.C. app. § 2(2). Section 2(3) expands upon this theme, enabling the head of the agency—through the IG—to be "fully and currently informed about agency problems and deficiencies, and the necessity for and progress of corrective action by the agency." 5 U.S.C. app. § 2(3). Plainly, the IG represents and safeguards the entire agency's interests when it investigates the actions of the agency's employees. Such activities support, rather than threaten, broader agency interests and make the IG a participant, with other agency components, in meeting various statutory obligations, including the agency's labor relations obligations under the Statute.

(2) *Legislative History*

We have already noted that the expressed legislative intent in enacting section 7114(a)(2)(B) was to provide rights to Federal sector bargaining unit employees

consistent with those provided in the private sector under *Weingarten*. *See* IV.A.1., above. We agree with the Third Circuit that the purpose of the IG Act is "to insulate Inspector Generals [sic] from pressure *from agency management* which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse." *DCIS*, 855 F.2d at 98 (emphasis added). We find that this conclusion is entirely consistent with the statement of purpose in the legislative history of the IG Act: "The purpose of this legislation is to create Offices . . . to more effectively combat fraud, abuse, waste and mismanagement in agency programs and operations." S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676. Thus, we agree with the Third Circuit's rejection of the argument that the IG Act was "intended to create 'an independent investigatory office at the [agency] which would not be subject to interference by any other agency programmatic concerns, including federal labor relations.'" *DCIS*, 855 F.2d at 98. This broad reading is "unsupported by the text and legislative history of the IG Act." *Id.*

(3) *Interrelationship Between Section 7114(a)(2)(B) and the IG Act*

The D.C. Circuit concluded in *DOJ* that if required to comply with 5 U.S.C. § 7114(a)(2)(B), "the Inspector General's independence and authority would necessarily be compromised." *DOJ*, 39 F.3d at 361. With all due respect, we disagree. Our examination of the IG Act does not reveal any irreconcilable conflict with section 7114(a)(2)(B) of the Statute. In particular, no provision in the IG Act cited by the D.C. Circuit as support for its finding of an incompatibility between the IG Act and the Statute, *DOJ*, 39 F.3d at 367, would be rendered ineffective by the right to have a union

representative present during an OIG investigative interview. For example, compliance with the Statute does not prevent an agency IG from "conduct[ing] audits and civil and criminal investigations relating to the Department's operations. 5 U.S.C. app. § 4(a)(1)." *Id.* Nor does compliance with the Statute preclude an IG from "notify[ing] the Attorney General directly, without notice to other agency officials, upon discovery of 'reasonable grounds to believe there has been a violation of Federal criminal law' [5 U.S.C. app. § 4(d)]." *Id.* Rather than hindering such investigations, we find that providing section 7114(a)(2)(B) rights to Federal bargaining unit employees will serve in this context as well the salutary purposes the Supreme Court envisioned in its *Weingarten* decision, *e.g.*, clarifying issues or facts, raising extenuating factors, suggesting other employees having knowledge, and protecting the interests of the entire bargaining unit. *Weingarten*, 420 U.S. at 260-61.

Moreover, as we have held, and as the Third Circuit noted in *DCIS*, 855 F.2d at 100-01, the representational function of a *Weingarten* representative is limited. Among other things, the employer may insist on hearing the employee's own account of the matter under investigation and the union's presence need not transform the examination into an adversary proceeding. *Id.* (relying upon *Weingarten*, 420 U.S. at 260, 262-63); *see also Norfolk Naval Shipyard*, 9 FLRA 458 (1982) (agency management may have need, under certain circumstances, to place reasonable restrictions on the exclusive representative's participation at a section 7114(a)(2)(B) examination). "Given the limited function of a *Weingarten* representative, it is conceivable to us that Congress might conclude that the

employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion in [IG] interviews." *DCIS*, 855 F.2d at 101.

In sum, we agree with the Third Circuit and "do not find section 7114 (a)(2)(B) and the mandate of the [IG] so clearly irreconcilable that we are willing to imply an exception based solely on the enactment of the IG Act." *Id.* at 100.

Even if we were to find a conflict between these two statutes, given the absence of statutory language evidencing a legislative intent that one is preemptive of the other,[24] we find no support for the D.C. Circuit's determination that the IG Act should trump the Statute in general, or section 7114(a)(2)(B) in particular. Resolving such an inconsistency "is a legislative decision . . . and nothing in the IG Act or its legislative history persuades us that Congress considered and resolved [this inconsistency] against federal employees when it passed [the IG] Act." *Id.* at 101. Should Congress disagree with our conclusion, it can amend the laws in accordance with its policy objectives.[25] *See id.*

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[24] *See, e.g.*, 32 U.S.C. § 709(e): "Notwithstanding any other provision of law . . ." which was interpreted as exempting National Guard Technicians from certain provisions of the Statute. *New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982) *cert. denied sub nom., American Federation of Government Employees, AFL-CIO, Local 3486 v. New Jersey Air National Guard, 177 Fighter Interception Group*, 459 U.S. 988 (1982). *Compare* 28 U.S.C. § 535(a) which governs the FBI's statutory authority, discussed in note 13, above.

[25] Further, section 5 of the IG Act, 5 U.S.C. app. § 5(a)(1), which requires an agency IG to report semiannually to Congress on, among other things, "significant problems . . . relating to the administration of programs and operations . . . ," provides an

Our reading of the Statute and the IG Act is consistent with the canons of statutory construction because it gives effect to each law while preserving their sense and purpose. *See, e.g., Morton, Secretary of the Interior v. Mancari*, 417 U.S. 535, 551 (1974); *NRC*, 25 F.3d at 237 (Murnaghan, J., dissenting) ("Neither the Inspector General Act nor the [Statute] . . . is deserving of more or less statutory dignity than the other."). We are unwilling, as is the Third Circuit, "to find a partial, implied repeal of section 7114(a)(2)(B) based solely on Congress' decision in 1978 to authorize the creation of inspector general offices in a number of federal agencies." *DCIS*, 855 F.2d at 100.

C. *NASA, OIG and NASA, HQ Have Violated the Statute*

1. *NASA, OIG*

By the conduct of investigator Dill, NASA, OIG violated section 7114(a)(2)(B) of the Statute and thus committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute. The Authority has long held that "when a component of an agency engages in conduct which unlawfully interferes with the protected rights of employees of another component, a violation of section 7116(a)(1) of the Statute will be found to have occurred." *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*).[26] Here, we conclude that the conduct of

agency IG with a mechanism to communicate directly with Congress should compliance with section 7114(a)(2)(B) of the Statute present an agency OIG with "significant problems."

[26] This concept has its genesis in the private sector. *See Austin Co.*, 101 NLRB 1257, 1258-59 (1952). There, a violation was found even though Austin was not the employer of the employees

the NASA, OIG investigator interfered with the rights of the unit employees at MSFC, another subcomponent of NASA.[27] Accordingly, having found earlier herein that NASA, OIG is a representative of the agency, we find that NASA, OIG has violated the Statute.

2. *NASA, HQ*

We also find, contrary to the Judge, that NASA, HQ violated section 7114(a)(2)(B) of the Statute and thus committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.[28] In this regard, we

whose rights were violated. The Board premised liability on a finding that an "intimate business character" existed between Austin and the employer of the employees and that they shared a "community of interests." *See also Hudgens v. NLRB*, 424 U.S. 507, 510 n.3 (1976) (citing *Austin Co.* approvingly). For the reasons discussed above, we find that such a relationship is shared by NASA, OIG, NASA, HQ, and the MSFC.

[27] In reaching this conclusion, and as discussed above in section IV.B.1., we note that the D.C. Circuit rejected, in a similar scenario, a finding of a violation against the OIG because the union in that case was not the exclusive representative of the Office of the Inspector General. *DOJ*, 39 F.3d at 365. Although the court's point is indisputable, it is not determinative of whether the Statute has been violated. *DLA*, 22 FLRA at 884.

[28] There were no exceptions filed with respect to the Judge's recommended dismissal of the complaint as to NASA, HQ. However, NASA, HQ is a party pursuant to 5 CFR § 2421.11 and the Authority has previously addressed, *sua sponte*, matters that were not excepted to by the parties. *See, e.g., United States Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 43 FLRA 642, 654 (1991) (even though no exceptions were filed, because ALJ applied incorrect standard, Authority independently examined negotiability of proposal, applying the correct standard), *enforced sub nom. United States Immigration and Naturalization Service, United States Border Patrol v. FLRA*, 12 F.3d 882 (9th Cir. 1994).

have discussed the investigative role that OIGs perform for the agency. Investigative information is shared with the agency head and other subcomponents of the agency and is a basis upon which disciplinary action is taken. Thus, the OIG represents not only the interests of the OIG, but ultimately NASA, HQ and its subcomponent offices.

Moreover, the IG Act specifically provides that IGs report to and are under the supervision of the head of the agency. 5 U.S.C. app. § 3(a). *See* II.A., above. Accordingly, NASA, HQ is responsible for the statutory violations committed by its OIG in this case.

In reaching this conclusion, we recognize that although the MSFC has a collective bargaining relationship with Local 3434, NASA, HQ does not. However, this does not preclude a finding of a statutory violation against NASA, HQ. The *DLA* rationale, holding one subcomponent of an agency responsible for actions which affect another subcomponent, *DLA*, 22 FLRA at 884, has been applied to the parent agency's actions involving a subcomponent. *See, e.g., U.S. Department of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993); *Headquarters, U.S. Air Force, Washington, D.C. and 375th Combat Support Group, Scott Air Force Base, Illinois*, 44 FLRA 117, 125 (1992), *rev. denied sub nom. Headquarters, U.S. Air Force, Washington, D.C. v. FLRA*, 10 F.3d 13 (D.C. Cir. 1993) (without opinion). NASA, HQ's failure to ensure that its IG comply with the Statute justifies a finding of a statutory violation.

We conclude that holding NASA, HQ responsible for the manner in which its OIG conducts investigative interviews pursuant to section 7114(a)(2)(B) fully effectuates the purposes of the Statute. In reaching

this conclusion, we recognize that the Authority has, in similar circumstances, previously declined to hold an agency headquarters responsible for the actions of its IG. *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Professional Responsibility, Washington, D.C. and National Border Control Council, American Federation of Government Employees*, 46 FLRA 1526, 1571 (1993) *rev'd sub nom. But cf. U.S. Department of Labor, Mine Safety and Health Administration*, 35 FLRA 790 (1990) (holding the Mine Safety and Health Administration liable for the illegal actions of the Department's IG in a case where the Inspector General was not charged).

However, the Authority also has noted in prior decisions that it is appropriate for agency headquarters with administrative responsibility for the Office of Inspector General to advise IGs "of the pertinent rights and obligations established by Congress in enacting the Federal Service Labor-Management Relations Statute. More particularly, . . . investigators should be advised that they may not engage in conduct which interferes with the rights of employees under the Statute." *DOD, DCIS*, 28 FLRA at 1151. It is with this objective in mind—ensuring that the Office of Inspector General is advised by its statutory superior of the obligation to comply with the Statute—that we find the purposes underlying the Statute will be effectuated by holding NASA, HQ liable for the actions of its Inspector General. As set forth in this decision, despite a degree of independence, the IG is nevertheless under the direct supervision of the head of the agency. Accordingly, we will no longer follow Authority precedent

declining to hold an agency headquarters responsible for the statutory violations of its Inspector General.

V. *Order*

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, NASA Headquarters, Washington, D.C., and NASA Office of Inspector General, Washington, D.C., shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of Marshall Space Flight Center to take part in an investigatory examination conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the employee's exclusive representative to actively participate in such examination.[29]

(b) In any like or related manner, interfering with, restraining or coercing Marshall Space Flight

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[29] Consistent with our case law, we have modified the scope of the Judge's recommended Order and Notice to require Respondents: (1) to cease and desist from interfering with the rights of the bargaining unit employees at Marshall Space Flight Center; and (2) to post the corresponding Notice at Marshall Space Flight Center, the only NASA site where bargaining unit employees are located. *See, e.g., Department of Housing and Urban Development, San Francisco, California*, 41 FLRA 480, 482 (1991) (posting of notices required only at sites where bargaining unit employees are located as evidence that their rights guaranteed under the Statute will be enforced).

Further, we are not ordering the reconstruction type of relief the Authority ordered in *Safford*, 35 FLRA at 450, because the record does not establish, nor does the General Counsel contend, that P's removal was connected in any way with the interview that violated the Statute. Judge's Decision at 4.

Center employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) NASA Headquarters shall order the NASA Office of Inspector General to comply with the requirements of section 7114(a)(2)(B) when conducting investigatory examinations of employees pursuant to that section of the Statute.

(b) NASA Headquarters shall post at Marshall Space Flight Center, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the NASA Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT

WE WILL NOT require any bargaining unit employee at the Marshall Space Flight Center to take part in an investigatory examination of a bargaining unit employee conducted pursuant to section 7114(a) (2)(B) of the Federal Service Labor-Management Relations Statute (Statute) without allowing the exclusive representative of such employee to actively participate in the examination.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce Marshall Space Flight Center bargaining unit employees in the exercise of their rights assured them by the Statute.

_____

NASA Headquarters and NASA
Office of Inspector General
Washington, D.C.

Date: _____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Atlanta Regional Office, Federal Labor Relations Authority, whose address is 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY)

AT-CA-30481

STATEMENT OF SERVICE

I hereby certify that copies of the Decision and Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following parties:

Barbara Long Union Representative American Federation of Government Employees, Local 3434 Room 150, Bldg. 4471 MSFC, AL 35812	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*
Elizabeth Richardson Agency Representative Office of Inspector General National Aeronautics and Space Administration Washington, D.C. 20546	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*
Brent S. Hudspeth Counsel for the General Counsel Federal Labor Relations Authority 1371 Peachtree St., NE., Suite 122 Atlanta, GA 30309-3102	*CERTIFIED MAIL* *RETURN RECEIPT* *REQUESTED*

DATED: July 28, 1995
WASHINGTON, D.C.

/s/ DEBORAH D. JOHNSON
DEBORAH D. JOHNSON
Legal Technician

APPENDIX C

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AT-CA-30481

HEADQUARTERS
NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
WASHINGTON, D.C.
(RESPONDENT)

and

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.
(RESPONDENT)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3434
(CHARGING PARTY/UNION)

CALJ 95-02

DECISION
October 21, 1994

Before: GARVIN LEE OLIVER
Administrative Law Judge

Statement of the Case

The unfair labor practice complaint alleges that Respondents violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (8), by failing to comply with the provisions of section 7114(a)(2) (B) of the Statute. Respondents allegedly refused to allow a Charging Party (Union) representative to actively participate in the examination of a bargaining unit employee who reasonably feared discipline and requested the representation of the Union.

Respondent OIG's answer denied any violation of the Statute.

A hearing was held in Decatur, Alabama. Respondent OIG, the Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Respondent National Aeronautics and Space Administration, Washington, D.C. (NASA) is an agency under 5 U.S.C. § 7103(a)(3). The George C. Marshall Space Flight Center, Marshall Space Flight Center, Alabama (MSFC) is a component of NASA, and the Union is the exclusive representative of an appropriate unit of MSFC employees.

Respondent OIG is also a component of NASA. OIG was established by Public Law 95-452, as amended, 5 U.S.C. app. 3, to, among other things, "create independent and objective units—(1) to conduct and supervise audits and investigations relating to the programs and operations" and "(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies[.]" 5 U.S.C. app. 3 § 2(1) and (3). The Inspector General has the duty and responsibility "to provide policy direction for and to conduct, supervise, and coordinate" investigations. 5 U.S.C. app. 3 § 4(a)(1). The Inspector General reports to and is under the general supervision of the Administrator or NASA, but the Administrator cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing" any investigation. 5 U.S.C. app. 3 §§ 3(a); Joint Exh. 1.

The OIG maintains offices at all NASA Centers, including MSFC. OIG Agents assigned to the MSFC OIG Center Office are not under the supervision of any MSFC officials. They are subject to the direction of individuals in the OIG chain of command. (TR. 33).

In January 1993 OIG furnished information to MSFC officials indicating that P,[1] an employee of MSFC and a member of the bargaining unit represented by the Union, might pose a serious and immediate threat to his coworkers. P's name was linked with several documents which set forth potential threats and plans

[1] P's name is reflected in the record, but, due to the nature of the allegations against him and the limited relief requested by the General Counsel, it is not deemed necessary to set forth his full name in this decision.

for violence. As a result of this information, MSFC officials placed P on nonduty status with pay, restricted his access to the Center, and ordered him to report for a fitness for duty examination. (G.C. Exh. 2).

OIG Special Agent Larry E. Dill was assigned the investigation to determine whether P was indeed the author of the documents and, if so, whether he intended to carry out the actions set forth in them. The only timely way to resolve the authorship issue was to interview P as soon as possible. Dill contacted P, and P agreed to be interviewed in the office of his attorney, Bo Emerson. P requested that both his attorney and his Union representative be allowed to be present at the interview. Dill agreed. (Tr. 38-39). Respondent OIG admits that it was reasonable for P to believe that the examination could result in disciplinary action. (Tr. 8).

In preparation for the interview, Special Agent Dill prepared an outline. (Respondent Exh. 1). This outline included the following ground rule:

> The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government.

The examination was conducted on January 25, 1993 and attended by Special Agents Dill and David Carson of the OIG Office, P, Union Steward Patrick Tays, and Attorney Bo Emerson. (Tr. 39). Dill read aloud his prepared ground rules, including the above, but leaving out the words "if present." (Tr. 41). Tays objected to this statement and pointed out that he was "there to represent the union's and the bargaining unit's

interests and P's interests." (Tr. 24). Dill listened to Tays' objection, stated that this was indeed a ground rule for the meeting, and read his statement again. (Tr. 24, 42). Tays objected again, arguing that he was not present as a witness and would refuse to be called as a witness. (Tr. 24). Dill said he would cancel the meeting and move it someplace else at a different time if Tays did not "maintain" himself.[2] (Tr. 29).

Early in the interview, Dill asked questions of P and provided P and his attorney, who were seated near Dill, some documents to peruse. After P returned the documents to Dill, Tays, who was seated at the opposite end of the table, requested, in "a somewhat agitated tone of voice," to see the documents. Dill regarded this as "a distinct interruption of the interview process" because he "had completed what [he] wanted to do with those documents with Mr. Emerson and P" and "[i]f Mr. Tays had wanted to see those documents, [he should have] viewed them while Mr. Emerson and P were viewing [them]." Nevertheless, Dill passed the documents to Tays after P "basically stated that it was okay to pass those documents to Mr. Tays." (Tr. 41-44). Thereafter, when Dill passed documents to P, Tays walked over and stood behind P and Emerson to view them. (Tr. 24).

Later on in the interview process, Dill asked P if he felt his coworkers were afraid of him. Tays advised P

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[2] Dill testified that he had no recollection of stating that he "would cancel the interview unless Mr. Tays shut up or left." He acknowledged, "I was at a point in time where that was not prudent to turn around and establish this for another day because we had brought all these folks together, and we needed to press on and get this issued resolved." (Tr. 42). I credit Tays' testimony on this point.

that he didn't think P should answer as he would be giving an opinion and couldn't really answer the question accurately. Dill responded that Tays could not direct P not to answer as he "was just there." When P's attorney spoke up and said that P should not answer the question, Dill said, "Okay, fine," and went on to other questions. (Tr. 25).

Tays testified that the OIG's actions regarding his role in the proceeding affected the way P subsequently reacted to Tay's questions of comments. Fore example, when he advised P to avoid a discussion about fantasies with OIG agents, P ignored him and paid attention only to his attorney of Dill. (Tr. 25-26).

P was ultimately removed from his employment at MSFC. The Union does not know his whereabouts. (Tr. 20, 26).

Conclusions

The General Counsel contends that the examination was by a representative of the Respondent NASA and Respondent OIG and the representative's conduct interfered with the Union's right to be represented and/or would have a reasonable tendency to interfere with the Union's right to be represented. The General Counsel seeks a remedial cease and desist order and a notice to be signed by the Administrator, NASA and Director, OIG and posted at every NASA facility where the Union is the exclusive representative.

Respondent OIG defends on the basis that OIG was faced with a delicate situation and acted reasonably to protect the safety of MSFC employees, P's individual rights, and the Union's representational rights. OIG contends that the ground rules were proper to keep the situation from becoming adversarial and emotionally

charged and did not reasonably tend to intimidate or coerce Mr. Tays. OIG claims that Mr. Dill did nothing during the interview to interfere with Mr. Tays' rights to fully participate as a Union representative. OIG points out that Mr. Dill never asked Tays to leave the room, to shut up or be quiet, and never stopped him from looking at documents, restricted his movements, or threatened him with disciplinary action.

Section 7114(a)(2) provides:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> . . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if —
>
> (1) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (2) the employee requests representation.

The examination of P was conducted by Special Agent Dill under the direction of Respondent OIG. Thus, he was a "representative of the agency" under section 7114(a)(2)(B). In *Department of Defense, Defense Criminal Investigative Service*, 28 FLRA 1145 (1987), *aff'd sub nom. DCIS v. FLRA*, 855 F.2d 93, 100 (3d Cir. 1988), the court found that the degree of supervision exercised by agency management over investigators is irrelevant when the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information con-

cerning possible misconduct on the part of agency employees in connection with their work. Here the OIG investigator was employed by the same parent agency, NASA, as was P, and was questioning P regarding possible misconduct in connection with his work. The record establishes that the information secured by OIG is referred for administrative or disciplinary action to MSFC, where the employee's collective bargaining unit is located. *See also U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254, 1261 (1993) (*Justice, OIG*).

In *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 438-40 (1990) the Authority reviewed the provision, purposes, and benefits of section 7114(a)(2)(B), as follows, and held that by directing a union representative to remain silent—"just to be present during this interview"—the agency violated section 7116(a)(1) and (8):

> Section 7114(a)(2)(B) provides that an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. The purpose of section 7114(a)(2)(B) is to create representational rights for Federal employees similar to the rights provided by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act (NLRA). *See* 124 Cong. Rec. 29184 (1978), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute*, H.R. Comm. Print No. 7, 96th

Cong., 1st Sess. 926 (1979) (*Legislative History*), where Congressman Udall explained that the purpose of the House bill provisions which led to enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*).

Under *Weingarten*, the right to representation at an examination is intended to benefit an employee who is called into a meeting with his or her employer in connection with an investigation as well as to benefit the employer and the union. *See* Wireman, *Union Representation at Investigatory Interviews: The Subsequent Development of Weingarten*, 28 Cleveland State L. Rev. 127, 129-31 (1979). In particular, representation at an investigatory interview promotes a more equitable balance of power between labor and management. *See Weingarten*, 420 U.S. at 261-62, where the Court noted that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [National Labor Relations] Act was designed to eliminate[.]" Such representation also contributes to preventing unjust discipline and unwarranted grievances. In *Weingarten* the Court noted that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-63. In such circumstances, the Court concluded that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the

employer production time by getting to the bottom of the incident occasioning the interview." *Id.* at 263. In support of its conclusion that representation could be beneficial to the employer as well as the employee, the Court quoted from an arbitrator's award that described the representation process as contemplating "that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified." *Id.* at 262-63 n.7.

In view of the legislative history underlying section 7114(a)(2)(B), cited above, we conclude that the purposes underlying the *Weingarten* right in the private sector—promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances—also apply to the right to representation created by section 7114(a)(2)(B). These purposes are consistent with the overall purposes and policies of the Statute set forth in section 7101. That is, they effectuate "the right of employees to organize, . . . and participate through labor organizations . . . in decisions which affect them . . . [which] safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes[.]" Insofar as representation at examinations promotes a more equitable balance of power between management and labor, we believe that this is consistent with the intent of Congress in passing the Civil Service Reform Act (CSRA), Pub. L. 95-454, of which the Statute constitutes title VII. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 107 (1983) in which

the Court noted, "[i]n passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest[.]"

The purposes underlying section 7114(a)(2)(B) and the benefits intended for the various parties cannot be achieved if the union representative is prohibited from taking an active role in assisting an employee in presenting facts at an examination. Consequently, under section 7114(a)(2)(B) representation includes the right of the Union representative to take an "active part" in the defense of the employee. *Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri*, 6 FLRA 678, 678-79, n.2 (1981); *NLRB v. Texaco, Inc.*, 659 F.2d 124 (9th Cir. 1981).

In *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834, 840 (1991), the Authority stated, "The Authority has long held that for the right of representation to be meaningful, the representative must have complete freedom to assist, and consult with, the employee," citing *U.S. Customs Service, Region VII, Los Angeles, California*, 5 FLRA 297, 306 (1981) (*Customs*). In *Customs* the Authority found a violation where the representative's active participation was limited to a "practice" interview, he was admonished not to speak out or make statements during the subsequent taped interview, and was only allowed to volunteer additional information at the end of the taped interview.

As Counsel for the General Counsel points out, the Supreme Court in *Weingarten* also noted that the union representative is "safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." 420 U.S. at 260-61. Based on this proposition, it is now well established that representation by a private attorney does not divest an employee of his right to union representation at the examination. *See, e.g., American Federation of Government Employees, Local 1941 v. FLRA*, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988) ("The union's interest is not vindicated by the presence of counsel for the employee[.]")

The record reflects that Special Agent Dill advised Tays at the outset that he "serves as a witness and is not to interrupt the question and answer process." A common dictionary meaning of "witness" is "One who has seen or heard something," or "One who is called upon to be present at a transaction in order to attest to what takes place." *Webster's II New Riverside University Dictionary*, 1324 (1988). Special Agent Dill's ground rules statement conveyed the clear message that Tays was to be strictly an observer and not one who would take an active part in the proceedings. Special Agent Dill subsequently threatened to cancel the meeting if Tays did not "maintain" himself, and later informed Tays that he was "just there." These actions interfered with the Union representative's ability to take an active part in assisting the employee to elicit and present facts as contemplated by the Statute.

The Supreme Court declared in *Weingarten* that the presence of the Union representative "need not transform the interview into an adversary contest," 420 U.S. at 263, and the Authority has held that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise the integrity of the employer's investigation. *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645, 652 (1990).

Union representative Tays objected to Dill's description of his role in the proceedings when Dill read and then reread from his ground rules. Tays also raised his voice when he requested to view the documents which had been shown to P and P's attorney. These minor and justifiable reactions did not unduly disrupt or interfere with the objective of the examination and were insufficient to deny Tays his right to take an active role in the examination.

Respondent OIG contends that Mr. Tays was able to fulfill his responsibility to the bargaining unit. The fact that Mr. Tays may have done so is immaterial. An agency can not impose an unduly restrictive limitation on a union representative and later escape responsibility by taking advantage of, or finding fault with, the representative's conduct under the circumstances. *U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 46 FLRA 1526, 1568 (1993) (*INS, Twin Cities*) (*petition for review filed as to other matters sub nom. U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Twin Cities, Minnesota, et al. v. FLRA*,

No. 93-1283 (D.C. Cir. Apr. 26, 1993); *Department of the Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Washington*, Case No. 9-CA-80368, 87 ALJDR (1990).

By the conduct of Special Agent Dill, described above, Respondent OIG failed to comply with section 7114(a)(2)(B) of the Statute and thereby committed an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

There is no evidence in the record that Respondent NASA was responsible for this violation. Therefore, it is recommended that such allegations as to Respondent NASA be dismissed. *Justice, OIG*, 47 FLRA at 1255, 1271; *INS, Twin Cities*, 46 FLRA at 1528, 1569.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that National Aeronautics and Space Administration, Office of the Inspector General, Washington, DC, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the National Aeronautics and Space Administration to take part in an examination in connection with an investigation, without allowing the exclusive representative of such employee to actively assist such employee, where representation has been requested by the employee and the employee reasona-

bly believes that the examination may result in disciplinary action against him or her.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at all NASA facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Inspector General, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 21, 1994

/s/ GARVIN LEE OLIVER
GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee of the National Aeronautics and Space Administration to take part in an examination in connection with an investigation without allowing the exclusive representative of such employee to actively assist such employee, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Activity)

Date:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, 1371 Peachtree Street, NE, Suite 122, Atlanta, GA 30309-3102, and whose telephone number is: (404) 347-2324.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6630

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
WASHINGTON, D.C. AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
WASHINGTON, D.C., RESPONDENTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, INTERVENOR.

No. 95-6690

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
WASHINGTON, D.C. AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
OFFICE OF THE INSPECTOR GENERAL,
WASHINGTON, D.C., PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT,

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
AFL-CIO, INTERVENOR.

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. COX
UNITED STATES
CIRCUIT JUDGE

ORD-42
(6/95)

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.